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In the Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN L. STEINBRINK, ACTING COMPTROLLER OF THE CURRENCY, ET AL., PETITIONERS

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

ROBERT V. ZENER
JACOB M. LEWIS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether 12 U.S.C. 92, which authorizes national banks "located and doing business" in places of 5,000 or fewer inhabitants to act as the agent for "any fire, life or other insurance company," was repealed in 1918.

PARTIES TO THE PROCEEDING

The petitioners are Stephen L. Steinbrink, Acting Comptroller of the Currency (substituted as a party pursuant to Rule 35.3); the Office of the Comptroller of the Currency; and the United States.

The respondents are the Independent Insurance Agents of America, Inc.; the Independent Insurance Agents of Oregon; the National Association of Casualty and Surety Agents; the National Association of Life Underwriters; the National Association of Professional Insurance Agents; the National Association of Surety and Bond Producers; the Oregon Association of Life Underwriters; and the Oregon Professional Insurance Agents, Inc.

By virtue of Rule 12.4, the United States National Bank of Oregon, an intervenor-defendant below, is also a party in this Court. We understand that it plans to file a petition for a writ of certiorari seeking review of the judgment of the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Acting Comptroller of the Currency, the Office of the Comptroller of the Currency, and the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The statements filed with the order denying the suggestions for rehearing en banc (App., *infra*, 34a-42a) are reported at 965 F.2d 1077. The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 955 F.2d 731. The opinion of the district court (App., *infra*, 43a-73a) is reported at 736 F. Supp. 1162. The approval letter of the

Comptroller of the Currency (App., *infra*, 74a-79a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1992. A petition for rehearing was denied on May 22, 1992. On August 7, 1992, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 13 of the Federal Reserve Act of 1913, ch. 6, 38 Stat. 263; the Federal Reserve Act Amendments of 1916, ch. 461, 39 Stat. 752; and Section 20 of the War Finance Corporation Act of 1918, ch. 45, 40 Stat. 512, are reproduced at App., *infra*, 80a-94a.

STATEMENT

1. In 1984, the United States National Bank of Oregon, which is headquartered in Portland, sought approval from the Comptroller of the Currency to sell insurance as an agent through a subsidiary located in a branch bank in Banks, Oregon, a town of 489 persons. The Comptroller approved the Board's application, relying on a provision of federal law formerly codified at 12 U.S.C. 92 which authorizes a national bank "located and doing business in any place the population of which does not exceed five thousand inhabitants" to act as an agent for "any fire, life or other insurance company." The Comptroller determined that, under Section 92, the Bank's subsidiary could sell a full range of insurance products to existing and potential customers in Oregon and other States in which the subsidiary is authorized to engage in the insurance business. See App., *infra*, 79a.

Respondents—various trade associations representing insurance agents—challenged the Comptroller's decision in the United States District Court for the District of Columbia. The insurance agents argued that Section 92 placed geographic restrictions on sales of insurance by banks in small towns such that the Bank's branch in Banks, Oregon, should be limited to sales of insurance in that community.

The district court first noted that Section 92 no longer appears in the United States Code.[1] App., *infra*, 44a-45a n.2. The court assumed, however—on the basis of the fact that "Congress, other courts, and the Comptroller have presumed its continuing validity"—that the statute "exists *in proprio vigore*." *Ibid.* at 45a. The court went on to conclude that the Comptroller's interpretation of Section 92 was "rational and consistent with the statute" (App., *infra*, 70a-71a), and accordingly upheld the Comptroller's decision authorizing the Bank's subsidiary "to offer insurance to customers residing outside Banks, Oregon" (*id.* at 73a).

2. Concluding that Section 92 had been repealed in 1918, a divided court of appeals reversed and remanded with instructions to enter judgment for the insurance agents. App., *infra*, 20a. The court ob-

[1] Section 92 appeared in the editions of the United States Code issued in 1926, 1928, 1934, 1940, and 1946. It has not appeared in any subsequent edition of the United States Code. In its place, there is a notation by the codifiers that the provision was omitted in the 1918 amendment of Section 5202 of the Revised Statutes.

served that it had asked for further briefing on the issue of Section 92's continued existence, in response to which the parties had "agreed that section 92 remains in effect." App., *infra*, 4a. Nevertheless, the court concluded, given that the underlying controversy revolved around the interpretation of a statute that had been omitted from the United States Code, that it had a duty to inquire into the statute's existence. *Id.* at 6a.

In performing this inquiry, the court engaged in a detailed analysis of three laws enacted in 1913, 1916, and 1918, with a particular focus on the quotation marks appearing in the 1916 Act. The court first examined Section 13 of the Federal Reserve Act, which had been enacted in 1913. Ch. 6, § 13, 38 Stat. 251, 263-264, *reprinted* App., *infra*, 80a-82a. In the midst of paragraphs setting out the "powers of federal reserve banks" (the title of Section 13), Congress in 1913 included a paragraph that commenced "[s]ection fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows," and went on to list five types of liabilities that a national bank may incur in "an amount exceeding the amount of its capital stock."

The court next examined the 1916 amendment to the Federal Reserve Act, which, among other things, amended Section 13. See ch. 461, 39 Stat 752, 753 (1916), *reprinted* App., *infra*, 83a-93a. The 1916 amendment of Section 13 commenced by providing "[t]hat section thirteen be, and is hereby amended to read as follows," followed by a colon and opening quotation marks. The 1916 amendment went on to reprint Section 13 as it had been enacted in 1913, with certain changes. Each paragraph began with opening quotation marks, and no closing quotation marks appeared until the end of the sixth paragraph, which immediately preceded the paragraph beginning Section 5202 of the Revised Statutes "is hereby amended to read as follows." That latter paragraph was reprinted in the 1916 amendment without any change in wording from 1913; however, opening quotation marks were added after the paragraph's introductory phrase. The next paragraph, which provided for regulation of the discounting of bills of exchange and acceptances authorized by the Federal Reserve Act, was amended substantively in 1916, and opening quotation marks were placed before that paragraph as well. The following paragraph, which was new in 1916 and was later codified at 12 U.S.C. 92, granted national banks in small towns the power to act as insurance agents. That paragraph (henceforth "Section 92") also began with quotation marks. No closing quotation marks appeared until the end of the paragraph following Section 92. On account of the placement of the quotation marks, the court of appeals concluded that, "on its face, the 1916 amendments had the effect of placing section 92 within section 5202 of the Revised Statutes." App., *infra*, 9a. That is, the court concluded that the first six paragraphs (all of the paragraphs up to the first closing quotation marks), were part of Section 13, while the next four paragraphs (up to the second closing quotation marks) were part of Rev. Stat. § 5202.

The court then turned to the 1918 War Finance Corporation Act, ch. 45, § 20, 40 Stat. 512, *reprinted* App., *infra*, 94a. In Section 20 of the 1918 Act, Congress specified that "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows," and then

listed the five types of liabilities national banks may incur in excess of their indebtedness as listed by the Federal Reserve Act of 1913, and added a sixth type: "Liabilities incurred under the provisions of the War Finance Corporation Act." The 1918 Act did not restate any of the three paragraphs from the 1916 Act that had followed the paragraph of that Act commencing "[s]ection fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows." Because the War Finance Corporation Act did not set out those three paragraphs (which included Section 92), the court concluded that they had been repealed in 1918. App., *infra*, 9a-10a.

The court of appeals acknowledged that "the placement of section 92 in section 5202 of the Revised Statutes [by the 1916 Act] might well have been a mistake." App., *infra*, 19a. In that connection, the court noted that when Congress had itself examined the question in 1958, "an impressive array of witnesses" had testified that Congress did not intend to place Section 92 in Section 5202 of the Revised Statutes in 1916. App., *infra*, 11a. But the court dismissed the intentions of the 1916 Congress as "essentially irrelevant," on the ground that what mattered were the actions of the 1918 Congress. App., *infra*, 12a. In that regard, the court found it "fair to assume" that members of the 1918 Congress "would have sought out a current text of section 5202 to work from, and not relied on institutional memories of what the text was, or should have been." *Ibid.* Since two "privately published services" placed Section 92 in Section 5202 of the Revised Statutes (9 U.S. Comp. Stat. Ann. § 9764 (West 1916); 3 U.S. Stat. Ann. § 5202 (T.H. Flood & Co. 1916)), and (in the

court's view) the quotation marks in the 1916 Act confirmed that conclusion, the court "assume[d] the 65th Congress understood section 92 to be part of section 5202, and that its exclusion from the amended section 5202 signaled its repeal." App., *infra*, 13a.

The court gave no weight to Section 92's subsequent treatment by Congress and the administrative agencies charged with administering the federal banking laws. The court acknowledged that Congress in 1982 had purported to amend Section 92, and that the Comptroller has continued to treat the provision as valid, but dismissed their views as "irrelevant" and "immaterial" to the issue of whether Section 92 had been repealed in 1918. App., *infra*, 15a. Similarly, the court dismissed the various judicial decisions since Section 92's omission from the Code that have relied upon Section 92—including *Commissioner* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394 (1972)—on the ground that in each of those cases the court "presumed" that Section 92 remains valid. *Id.* at 16a.

The court also eschewed the power to "rectify Congress's apparent error." App., *infra*, 14a. It distinguished numerous cases in which courts had disregarded erroneous statutory punctuation on the ground that each involved an error that "distorted the meaning of a statute," but did not lead to repeal of the statute. *Ibid.*

Judge Silberman, dissenting, would have upheld the Comptroller's decision as embodying a reasonable interpretation of Section 92, without reaching the question of whether the provision remains good law. Conceding that his position "might be thought counterintuitive" (App., *infra*, 27a), Judge Silberman

believed that the court had no duty to reach the issue of the statute's existence, which appellants had "carefully, deliberately and thoughtfully waived" (*id.* at 31a).

3. The Comptroller and the Bank filed timely petitions for rehearing with suggestions for rehearing en banc, which were denied. Judge Silberman (this time joined by two colleagues) again dissented on the ground that the panel should not have decided whether Section 92 had been repealed. In addition, Judge Silberman observed that the government had made "a forceful argument that the panel * * * decided the matter incorrectly." *Id.* at 40a. He added that "the panel's opinion * * * created legal uncertainty concerning the sale of insurance by banks located and doing business in small towns (which has been the settled practice for most of this century)." *Id.* at 40a-41a.[2]

REASONS FOR GRANTING THE PETITION

Subsequent to the D.C. Circuit's decision in this case, the Second Circuit held in *American Land Title Ass'n* v. *Clarke*, 968 F.2d 150 (1992), petition for cert. pending, that 12 U.S.C. 92 was not repealed in 1918. In reaching that conclusion, the Second Circuit specifically disagreed with the decision in this case (968 F.2d at 152), and review is warranted by this Court to resolve the express conflict. Whether Section 92 was repealed is an issue of sub-

[2] Judge Sentelle, joined by the panel majority, filed a statement concurring in the denial of rehearing en banc. App., *infra*, 35a-37a. Judge Randolph filed a separate statement expressing his view that "denials of rehearing *en banc* are best followed by silence." *Id.* at 42a.

stantial importance to national banks in small towns, which for three-quarters of a century have relied upon that provision to engage in insurance agency activities. Moreover, as the Second Circuit's decision in *American Land Title Ass'n* v. *Clarke* and this Court's decision in *Commissioner* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394 (1972), illustrate, whether Section 92 is good law may affect how courts resolve a number of other issues concerning national banks. Accordingly, this Court should determine whether Section 92 was repealed.[3]

A. The D.C. Circuit's decision conflicts squarely with the Second Circuit's decision in *American Land Title Ass'n* v. *Clarke*, in which the court held, "[c]ontrary to the view of the D.C. Circuit," that the omission of Section 92 from the 1918 War Finance Corporation Act was "inadvertent" and did not "effect[] a repeal of section 92." 968 F.2d at 152. Accord *Owensboro National Bank* v. *Moore*, Civ. Action No. 91-3 (E.D. Ky. Aug. 4, 1992), slip op. 15-16. In concluding that Section 92 remains in existence, the Second Circuit emphasized that "no mention of the insurance powers of national banks exists in the leg-

[3] We do not seek review to determine whether the D.C. Circuit erred by reaching the issue of Section 92's existence when the parties agreed that it had not been repealed. Whatever the merits of that dispute, it is not a jurisdictional question, so this Court would not be required to decide whether the court of appeals should have reached the issue if certiorari is granted. Since the uncertainty created by the court's holding that Section 92 was repealed would not be removed by the reversal of that judgment on the basis that the court should not have reached the issue, in our view this Court should focus exclusively in this case on whether Section 92 was repealed.

islative history" of the 1918 War Finance Corporation Act, and observed that "if it actually was Congress' intent to effect such a permanent change to an unrelated area of law," it would "expect some clue to this intent to appear somewhere in the legislative history." 968 F.2d at 154. Moreover, "it would be wholly incongruous," the court stated, "for Congress to repeal a provision regarding the totally unrelated matter of insurance agency powers in an emergency measure directed at winning the war," and it was "highly unlikely" that Congress's intent to encourage national banks to support the operations of the War Finance Corporation "would just happen to coincide with an intent to repeal provisions regarding national banks' insurance agency powers." *Ibid.*

Apart from the express conflict with *American Land Title*, the decision below is also in tension with those decisions, among them this Court's decision in *Commissioner* v. *First Security Bank of Utah*, where the assumption that Section 92 exists influenced the decision. See 405 U.S. at 401-405.[4] See also *Saxon* v. *Georgia Ass'n of Indep. Ins. Agents*, 399 F.2d 1010, 1012-1016 (5th Cir. 1968) (relying on Section 92 to

[4] In *Commissioner* v. *First Security Bank of Utah*, the Court noted that '[t]he revisers of the United States Code have omitted [Section 92] from recent editions of the Code," but added that "the Comptroller of the Currency considers § 92 to be effective." 405 U.S. at 401 n.12. The Court then relied on Section 92 in concluding that income from the sale of insurance could not be attributed to banks in places with more than 5,000 inhabitants, since Section 92 impliedly bars such banks from engaging in the insurance business. The Court concluded that "fairness requires the tax to fall on the party that actually receives the premiums rather than on the party that cannot." 405 U.S. at 405.

conclude that national banks cannot sell broad forms of insurance as agent); *Commissioner* v. *Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1966) (noting Comptroller's views that Section 92 had not been repealed). In *First National Bank of Lamarque* v. *Smith*, 610 F.2d 1258, 1262 n.6 (1980), the Fifth Circuit stated that "further discussion of the issue [of Section 92's existence] seems moot." The D.C. Circuit's decision in this case makes the issue a live controversy on which the courts are divided.

B. The decision below is also in error, although we reach that conclusion by a different route from that taken by the Second Circuit. In our view, analysis of the *text* of the 1916 Act, as opposed to its *punctuation*, shows that Section 92 was not placed in Section 5202 of the Revised Statutes in 1916. Thus, Section 92 was not affected at all—much less repealed—when Rev. Stat. § 5202 was amended in 1918.

1. As the court below correctly discerned, analysis of the quotation marks in isolation suggests that in 1916 Section 92 and its companion paragraphs were to be placed in Rev. Stat. § 5202. However, the text of the 1916 Act suggests a different structure. The paragraph preceding Section 92 in the 1916 Act refers to the Federal Reserve Board's authority to regulate the "discount and rediscount and the purchase and sale by any Federal reserve bank," of, among other things, "acceptances authorized *by this Act*." 39 Stat. 753 (emphasis added). The reference to "this Act" must mean the Federal Reserve Act, not Rev. Stat. § 5202, since the discount and rediscount authority was granted by the second and third paragraphs of Section 13 of the Federal Reserve Act, and not by Rev. Stat. § 5202. See 39 Stat. 752; 38 Stat. 263-264. By referring to "this Act," the paragraph preceding Section 92 follows the same usage as the second and

sixth paragraph preceding Rev. Stat. § 5202 in the 1916 Act, and those paragraphs were indisputably part of the Federal Reserve Act rather than Rev. Stat. § 5202. See 39 Stat. 752-753. Thus, the use of the term "this Act" suggests that, despite the placement of the quotation marks, the 1916 Act did not place the paragraph preceding Section 92 in Rev. Stat. § 5202.[5]

The text of the paragraph beginning Rev. Stat. § 5202 is "amended so as to read as follows" also supports the conclusion that it was only that paragraph that related to Rev. Stat. § 5202 because that paragraph refers to the "Federal reserve Act" rather than this Act." See 39 Stat. 753. The reference to the Federal Reserve Act by its full title is not surprising, since a reader of Rev. Stat. § 5202 would otherwise have no way of knowing to which Act the provision referred. The usage makes the inference to be drawn from the term "this Act" in the paragraph preceding Section 92 even stronger, since it suggests that Congress in 1916 distinguished between statutory provisions that were not to be placed in the Federal Reserve Act (and thus would have to refer to that Act by its full title) and provisions that remained part of the Federal Re-

[5] The paragraph preceding Section 92 (which provided for regulation of the discounting of bills of exchange and acceptances authorized by the Federal Reserve Act) had been enacted in 1913 and was amended substantively in 1916; in both 1913 and 1916, it followed the paragraph amending Rev. Stat. § 5202. Since the 1913 Act contained no quotation marks, it was entirely clear at that time that the paragraph was part of the Federal Reserve Act, not Rev. Stat. § 5202. Under the court of appeals' analysis, however, the quotation marks moved that paragraph from Section 13 to Rev. Stat. § 5202 in 1916, and it was then repealed in 1918 along with Section 92 and the paragraph following Section 92.

serve Act, which could intelligibly refer to the Federal Reserve Act as "this Act."[6]

In short, the text of the paragraph preceding Section 92 shows that it was not placed in Rev. Stat. § 5202. If the paragraph preceding Section 92 was not placed in Rev. Stat. § 5202, then there is no reason to think that any of the paragraphs that followed it, including the paragraph later codified as Section 92, were placed in Rev. Stat. § 5202.[7]

2. As a general matter, there is no reason to assume that the quotation marks should override the structure assumed by a statute's text. As this Court long ago recognized, "[p]unctuation is the most fallible standard by which to interpret a writing." *Ewing*

[6] The insurance agents have suggested that the reference to "this Act" in the paragraph preceding Section 92 could be read to refer to "Federal reserve Act" in the paragraph relating to Rev. Stat. § 5202. But the paragraph preceding Section 92 should have said "that Act" if it was to be placed in Rev. Stat. § 5202 and the reference was intended to mean "Federal reserve Act."

[7] The title of the 1916 Act, which "can aid in resolving an ambiguity in the legislation's text" (*INS* v. *National Center for Immigrants' Rights, Inc.*, 112 S. Ct. 551, 556 (1991) (citations omitted)), is inconsistent with the conclusion that the 1916 Act amended Rev. Stat. § 5202 by adding Section 92 and its companion paragraphs. That title, "An Act To amend certain sections of the Act entitled 'Federal Reserve Act,' approved December twenty-third, nineteen hundred and thirteen," nowhere suggests that the statute was adding matter to Rev. Stat. § 5202. The substance of the 1916 amendments also indicates that Section 92 was not placed in Rev. Stat. § 5202. Section 5202, originally enacted in 1863 as part of the National Bank Act (see Act of Feb. 25, 1863, ch. 58, § 42, 12 Stat. 677), had always dealt with limits on the indebtedness of national banks. By contrast, Section 92 had nothing to do with limits on indebtedness. Nor do Section 92's companion paragraphs.

v. *Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837). In this case, moreover, there is strong evidence that Congress did not intend the quotation marks in the 1916 Act to have any interpretive effect. Indeed, it appears that the statute's drafters did not intend to employ quotation marks at all.

The committee bill, which contained Section 92's companion paragraphs but not Section 92 (which was added by amendment), used quotation marks, but inconsistently.[8] During the debates, after Section 92 was added, Senator Brandegee drew attention to the committee's use of quotation marks, and asked Senator Owen, the Chairman of the Committee on Banking and Currency, whether he thought that "the amended sections ought to be left in quotation marks, so that they will appear in that way in the Federal reserve act?" 53 Cong. Rec. 11,155 (1916). Owen agreed that although quotation marks had been used in the committee report, he did "not think they should be used"; instead, he thought that they "should be omitted." *Ibid.* Brandegee thereupon suggested "that in the reprint to be made of the bill the quotation marks be omitted," to which Owen replied: "I accept that amendment." *Ibid.* The amendment was then adopted by the Senate without objection. *Ibid.*

[8] In the committee bill, opening quotation marks appeared after the provision stating that Section 13 was "amended to read as follows," and closing quotation marks did not appear until after the paragraph regarding the regulation of discounting of bills of exchange and acceptances authorized by the Federal Reserve Act (the paragraph preceeding Section 92 in the bill as enacted). H.R. Rep. No. 481, 64th Cong., 1st Sess. 1-3 (1916); 53 Cong. Rec. 10,998 (1916). The final paragraph, concerning foreign acceptances (which was printed in italics in the committee bill because it was to be added to existing law), had no quotation marks at all. *Ibid.*

It is difficult to know precisely at what point, and by whom, the quotation marks were reinserted.[9] What is clear is that the Act's drafters did not intend for the quotation marks to have any significance in interpreting the statute. There is thus no reason to conclude that the quotation marks should control over the evidence in the text of the 1916 Act that Section 92 was not placed in Rev. Stat. § 5202.

3. If Section 92 was not placed in Rev. Stat. § 5202, then there is no basis for an argument that it was repealed in 1918 by Section 20 of the War Finance Corporation Act. The 1918 Act amended Rev. Stat. § 5202 to provide for a sixth type of indebtedness that a national bank could assume in excess of the amount of its capital stock: "[l]iabilities incurred under the provisions of the War Finance Corporation Act." There is no evidence that Congress affirmatively intended to repeal Section 92 and its companion paragraphs in 1918. To the contrary, as the Second Circuit emphasized, Congress said not a word about deleting those provisions. 968 F.2d at 154.

In this case, the D.C. Circuit acknowledged that deleting Section 92 was "unrelated" to the 1918 Act's

[9] Materials obtained from the National Archives indicate that before publication in the Congressional Record, the Senate Conference Report did not contain any quotation marks, and although the House Conference Report had such marks inserted by hand, they do not conform to the marks as they appear in the enrolled Act. The Senate and House Conference Reports, as they were printed in the Congressional Record, *do* contain the quotation marks as they appear in the Statutes at Large. 53 Cong. Rec. 13,069 (1916) (Senate Conf. Rep.); 53 Cong. Rec. 13,354 (1916) (House Conf. Rep.). The enrolled Act, which has been examined in the National Archives, also contains the quotation marks as they appear in the Statutes at Large.

war financing goals, but assumed that the 1918 Congress understood Section 92 to be part of Rev. Stat. § 5202 because of the "facially unambiguous language" of the 1916 Act and the fact that two "privately published services" placed Section 92 in Rev. Stat. § 5202. App., *infra*, 13a, citing 9 U.S. Comp. Stat. Ann. § 9764 (West 1916); 3 U.S. Stat. Ann. § 5202 (T.H. Flood & Co. 1916). However, as shown above, the 1916 Act does not unambiguously show Section 92 to be part of Rev. Stat. § 5202. Indeed, insofar as resort is made to the text of the Act rather than its punctuation, the Act places Section 92 in Section 13 of the Federal Reserve Act. And it should be beyond dispute that the views of the editors of privately published services are not controlling.

Moreover, if it is "fair to assume" (as the D.C. Circuit did) that in drafting the 1918 Act interested members of Congress "would have sought out a current text of section 5202 to work from" apart from the Statutes at Large (App., *infra*, 12a), it seems unlikely that the drafters would have turned to private services. The most easily accessible compilation of the federal banking laws would have been that prepared by the Comptroller and published by the Senate Committee on Banking and Currency. That compilation showed Section 92 and its companion provisions as part of Rev. Stat. § 5202 *and* as part of Section 13 of the Federal Reserve Act. S. Doc. No. 412, 64th Cong., 1st Sess. 83-84 (1917) (Rev. Stat. § 5202); *id.* at 136-137 (Section 13). A compilation of the Federal Reserve Act prepared by the Federal Reserve Board in 1917 also placed Section 92 and its companion paragraphs in Section 13 of the Federal Reserve Act, although it reproduced the confusing punctuation of the Statutes At Large. Federal Res. Bd., *The Federal Reserve Act As Amended* 30 (1917).

Thus, even if the drafters of the 1918 Act had not looked at the language of the 1916 Act, they might reasonably have assumed on the basis of the compilations that Section 92 would continue in existence however Rev. Stat. § 5202 was amended. Indeed, the post-1918 compilations of the Senate Committee and the Federal Reserve Board continued to show Section 92 as part of Section 13 of the Federal Reserve Act. S. Doc. No. 216, 66th Cong., 2d Sess. 146 (1920). Accord Federal Res. Bd., *The Federal Reserve Act As Amended* 30 (1919).[10]

4. Thus, neither the agencies charged with administering the banking laws nor the congressional committees that oversaw their administration thought that Section 92 had been repealed in 1918. Moreover, the original compilers of the U.S. Code agreed with that conclusion and placed Section 92 in the initial Code in 1926 and in all subsequent versions until 1952.

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[10] The 1918 Act may be interpreted as supplying closing quotation marks that were missing in the 1916 Act. That is, there would be no basis for arguing that Section 92 was repealed in 1918 if closing quotation marks had appeared in the 1916 amendments following the paragraph beginning Rev. Stat. § 5202 is "amended so as to read as follows" and ending by providing that a national bank may assume indebtedness in excess of the value of its capital stock in connection, fifth, with "[l]iabilities incurred under the provisions of the Federal reserve Act." See App., *infra*, 86a. The 1918 Act added a sixth provision to Rev. Stat. § 5202 (authorizing excess indebtedness in connection with liabilities assumed under the 1918 Act), and it ended with closing quotation marks. If that sixth provision, including its closing quotation marks, is inserted after the fifth provision in the 1916 Act, it is clear that Section 92 and its companion paragraphs were not part of Rev. Stat. § 5202.

While the codifiers changed their view of the effect of the 1918 amendment (34 years after the amendment), neither Congress nor the Comptroller have changed their views. To the contrary, Congress has twice in recent years enacted legislation which has assumed Section 92's existence. See Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 403(b), 1510-1511 (amending "[t]he Act of September 7, 1916 (12 U.S.C. 92; 39 Stat. 753)" by "striking out" Section 92 authorization of real estate loan brokerage activity); Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 201(b)(5), 101 Stat. 583 (imposing a one-year moratorium on the expansion of national bank insurance agency activities "pursuant to the Act of September 7, 1916 (12 U.S.C. 92)"). The Comptroller, who is charged with implementing and interpreting Section 92, has consistently taken the position that the section was not part of Rev. Stat. § 5202 and was not repealed in 1918. See, *e.g.*, *Financial Institutions Act of 1957: Hearings on S. 1451 and H.R. 7026 before the H. Comm. on Banking and Currency*, 85th Cong., 2d Sess. 1036 (1958) (letter from Comptroller Gidney to House Banking Chairman Spence).

While an administrative agency cannot revive a repealed statute, the texts of the relevant statutes in this case, fairly read, do not support the conclusion that Section 92 was repealed. At the least, there is ambiguity. The Comptroller's permissible construction of the 1916 and 1918 Acts, which follows the text rather than the punctuation, should therefore control. See generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

C. The court of appeals' error—and the conflict between its decision and that of the Second Circuit in *American Land Title*—is also of sufficient importance to warrant plenary review by this Court. National banks located and doing business in small towns have for three-quarters of a century relied on the Comptroller's view that Section 92 is in effect and permits them to sell a broad range of insurance products.[11] The decision of the D.C. Circuit (where venue against the Comptroller is always proper, see 28 U.S.C. 1391(e)) does violence to the settled expectations of those banks that currently sell insurance under Section 92 and other banks that may rely on that authority in the future.[12]

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[11] The Office of the Comptroller, which has continued to update the information available to it regarding the insurance activities of national banks, estimates that at the present time between 90 and 100 national banks engage in a general insurance agency business. The American Bankers Association and the Oregon Bankers Association estimated before the court of appeals that some 160 national banks exercised their authority under Section 92 to sell insurance products. Supp. Br. of Amici Curiae in Support of Petition for Rehearing at 1. (The government similarly advised the court of appeals in its rehearing petition (at footnote 1) that "[a]lthough efforts to ascertain how many national banks are currently acting as agents for insurance companies are ongoing, preliminary results put the number at well over 100.") Whatever the exact figure, it is clear that a significant number of national banks currently engage in activities authorized by Section 92.

[12] In their opposition to rehearing, the insurance agents argued (at pp. 5-6) that the issue of Section 92's existence is of limited importance because a parallel provision of the Bank Holding Company Act, 12 U.S.C. 1843(c)(8)(C)(i), permits bank holding companies to sell insurance through

In addition, the issue of Section 92's existence has ramifications that extend beyond the question of whether small town national banks may engage in a general insurance agency business, because courts have regularly looked to Section 92 in resolving other banking issues. For example, the ultimate issue in *American Land Title* is whether national banks located in places with more than 5,000 inhabitants may sell title insurance pursuant to their authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. 24 (Seventh). The Second Circuit held that Section 92, by authorizing insurance agency activities only by those national banks located and doing business in places of with 5,000 or fewer inhabitants, impliedly bars national banks located and doing business in larger places from engaging in the title insurance agency business. 968 F.2d at 157.[13]

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subsidiaries in towns with 5,000 or fewer inhabitants. But a bank would not have to form a holding company to sell insurance if Section 92 remains on the books.

[13] It is the Comptroller's position, supported by *Independent Bankers Ass'n* v. *Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980), among other cases, that Section 92 does not constitute a limitation on activities (such as the sale of title insurance) that fall within the incidental powers of national banks, and thus that the Second Circuit's judgment in *American Land Title*—although not its conclusion that Section 92 exists—is in error. On September 4, 1992, Justice Thomas granted the Solicitor General's request for an additional 30 days to consider whether to file a petition for a writ of certiorari to review the *American Land Title* decision. The Solicitor General has since determined that the government will file a petition for a writ of certiorari in that related case. On September 17, 1992, the Chase Manhattan Bank, N.A., the intervenor-defendant in *American Land Title*, filed its own petition for a writ of certiorari seeking review of the Second Circuit's decision. See *The Chase Manhattan Bank, N.A.* v. *American Land Title Ass'n*, petition for cert. pending.

Similarly, in *Commissioner* v. *First Security Bank of Utah*, this Court overturned a determination by the Commisioner of Internal Revenue attributing to certain banks in large cities income derived from the sale of insurance policies received by affiliates. On the basis of the assumption that Section 92 bars such banks "from receiving insurance-related income" (405 U.S. at 402), the Court concluded "that fairness requires the tax to fall on the party that actually receives the premiums rather than on the party that cannot" (*id.* at 405). See also *id.* at 414 n.1 (describing Section 92 as "the dispositive factor" in the Court's analysis) (Marshall, J., dissenting); *id.* at 419 (noting "the Court's repetitive emphasis on the missing § 92") (Blackmun, J., dissenting). A number of courts of appeals have likewise drawn key inferences from the fact of Section 92's existence. See, *e.g.*, *Independent Ins. Agents of Am., Inc.* v. *Board of Govs.*, 835 F.2d 1452, 1456 n.8 (D.C. Cir. 1987); *Independent Bankers Ass'n* v. *Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980); *Commissioner* v. *Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1966); *First National Bank of Lamarque* v. *Smith*, 610 F.2d 1258, 1261 n.6 (5th Cir. 1980).

In light of the conflict in the circuits and the recurring nature of the question presented, this Court should decide whether Section 92 was repealed in 1918.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

ROBERT V. ZENER
JACOB M. LEWIS
Attorneys

SEPTEMBER 1992

APPENDIX A

UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

Nos. 90-5209, 90-5214

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., ET AL., APPELLANTS

v.

ROBERT L. CLARKE,
Comptroller of the Currency, ET AL.

NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, ET AL. APPELLANTS

v.

ROBERT L. CLARKE, ET AL.

Argued March 1, 1991

Decided Feb. 7, 1992

As Amended Feb. 25, 1992

Before SILBERMAN, BUCKLEY and HENDERSON, Circuit Judges.

Opinion for the court filed by Circuit Judge BUCKLEY.

Dissenting opinion filed by Circuit Judge SILBERMAN.

BUCKLEY, Circuit Judge:

Appellants challenge a ruling by the Comptroller of the Currency that would permit any national bank, or its branch, located in a community of not more than five thousand inhabitants to sell insurance to customers outside that community. The Comptroller based his ruling on section 92 of the National Bank Act. As we find *sua sponte* that that section has been repealed, and as the Comptroller cites no alternative authority for his ruling, we reverse.

I. Background

Section 92 was enacted in 1916 as an amendment to section 5202 of the Revised Statutes of the United States. It provided, in relevant part, that any national bank

> located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any . . . insurance company authorized by the authorities of the State in which said bank is located to do business in said State.

39 Stat. 750, 753 (1916). This provision was codified as section 92 of Title 12 of the United States Code. Although section 92 was omitted from section 5202 when the latter was revised and reenacted in 1918, and although the section has been omitted from re-

cent editions of the United States Code, the Comptroller has continued to treat it as valid. *See, e.g.*, 12 C.F.R. § 7.7100 (1991).

The appellant trade associations, which represent insurance agents and underwriters, challenge a ruling by the Comptroller that is based on section 92. The ruling holds that under that statute, "a national bank or its branch which is located in a place of 5,000 or under population may sell insurance to existing and potential customers located anywhere." Letter from Judith A. Walter, Senior Deputy Comptroller for National Operations, to Mr. T. Dalrymple (Aug. 18, 1986), *reprinted in* Joint Appendix at 65. Appellants assert that section 92 places a geographical limit on such sales; and they brought this action to have the ruling set aside under the APA as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A) (1988), as a national bank is not permitted to engage in any activity that is not specifically authorized by law. *See* 12 U.S.C. § 24 (1988).

The district court granted the Comptroller's motion for summary judgment based on its finding that his interpretation of section 92 was "rational and consistent with the statute." *National Ass'n of Life Underwriters v. Clarke*, 736 F.Supp. 1162, 1173 (D.D.C.1990) (internal quotation marks omitted). Although the court noted "that [section 92] no longer appears in the United States Code," it stated that it would "assume that the statute exists *in proprio vigore*" because "Congress, other courts, and the Comptroller have presumed its continuing validity." *Id.* at 1163 n. 2 (citations omitted). The court cited no other source of authority for the Comptroller's ruling; nor does the Comptroller claim any.

After the parties had submitted their appellate briefs, we asked them to address two questions: First, should this court decide the validity of section 92 in the absence of a challenge to that validity by any of the parties? Second, was section 92 in fact valid? In response to the first question, appellants took the position that this court was required to consider the validity of section 92 as it "would be without constitutional authority or power to render [a decision on the merits] if Section 92 [did] not exist." Supplemental Brief for Appellants at 3. The Comptroller, on the other hand, argued that it would be inappropriate for the court to address the issue: It had not been raised by the parties; and, in any event, "the legal issue identified by the Court [did] not go to its jurisdiction, but rather to the merits of plaintiffs' claims." Supplemental Brief for Federal Appellees at 5.

In responding to our second question, the parties agreed that section 92 remains in effect. They argue that Congress did not intend to repeal section 92. Its technical deletion, they claim, was the result of misplaced quotation marks and therefore should be ignored; moreover, as section 92 was unrelated to the purposes of the 1918 revision of section 5202, an intention to repeal it should not be imputed to Congress. Finally, the parties claim that subsequent action by Congress, the Comptroller, and the federal courts (including the Supreme Court) confirms that section 92 remains in effect.

For the reasons set forth below, we conclude that we must decide whether section 92 continues to have the force of law; and because we find it does not, we reverse.

II. Discussion

A. Should the court decide section 92's validity?

The role of the judicial branch is a limited one.

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.

Carducci v. Regan, 714 F.2d 171, 177 (D.C.Cir.1983) (Scalia, J.). On occasion, however, a court will find it necessary to go beyond the specific legal theories advanced by the parties. In *Arcadia, Ohio v. Ohio Power Co.*, —— U.S. ——, 111 S.Ct. 415, 112 L.Ed.2d 374 (1990), for example, the parties agreed that the case depended on the proper application of section 318 of the Federal Power Act. The Supreme Court concluded, however, that the challenged orders did not fall within the scope of that section, and it disposed of the case on another basis. *Id.* at 111 S.Ct. 418. *See also Kamen v. Kemper Financial Services, Inc.*, —— U.S. ——, 111 S.Ct. 1711, 1718, 114 L.Ed.2d 152 (1991) ("court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law"). Moreover, federal courts "are not bound to accept, as controlling, stipulations as to questions of law." *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39, 51, 60 S.Ct. 51, 59, 84 L.Ed. 20 (1939); *see also Sebold v. Sebold*, 444 F.2d 864, 870 n. 8 (D.C.Cir.1971) ("Since this is a question of law, . . . the agreement of counsel is not binding on this

court."). The Supreme Court has also held that a court must take judicial notice of a state law that is invalid, stating that "on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States." *Town of South Ottawa v. Perkins*, 94 U.S. 260, 268, 24 L.Ed. 154 (1876).

We believe that this is one of those occasions where a court may properly dispose of a case on a basis not advanced by the parties. Here, the legal question we are asked to decide is the geographical reach of section 92. We are on notice, however, that the section no longer appears in the United States Code. That fact gives rise to a statutory presumption that the law invoked by the parties is invalid, *see* 1 U.S.C. § 204(a) (1988), a presumption that the parties have been given ample opportunity to rebut. Because this controversy hangs on the interpretation of a statute that is presumed not to exist, we not only have the right to inquire into its validity, we have the duty to do so.

B. Is section 92 valid?

Section 204(a) of Title 1 of the United States Code states:

> The matter set forth in the edition of the Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the United States, general and permanent in their nature.

Therefore, in order to determine whether section 92 is valid, we first consult the Code. On inspecting 12 U.S.C. § 92 (1988), we find the following:

§ 92. Omitted

Codification

> The provisions of this section, which authorized national banking associations in any place where the population did not exceed 5,000 to act as an insurance agent or real estate broker, were added to R.S. § 5202 by act Sept. 7, 1916, were omitted in the amendment of R.S. § 5202 by act Apr. 5, 1918, and therefore this section was omitted from the Code. Pub.L. 97-320, Oct. 15, 1982, purported to amend the Act of September 7, 1916 by deleting [two provisions]. R.S. § 5202, as amended, was set out as section 82 of this title prior to repeal by Pub.L. 97-320.

12 U.S.C. § 92 (1988) (citations omitted). In sum, the codifiers treat section 92 as having been repealed in 1918.

Because we must look to the Code for *prima facie* evidence of federal law, its omission creates a presumption that section 92 does not exist. Still, other evidence may rebut that presumption; " 'the very meaning of "prima facie" is that the Code cannot prevail over the Statutes at Large when the two are inconsistent.' " *United States v. Welden*, 377 U.S. 95, 98 n. 4, 84 S.Ct. 1082, 1085 n. 4, 12 L.Ed.2d 152 (1964) (quoting *Stephan v. United States*, 319 U.S. 423, 426, 63 S.Ct. 1135, 1136, 87 L.Ed. 1490 (1943) (per curiam)). We must therefore examine the text of the Statutes at Large to see whether they rebut the presumption that section 92 has been repealed.

1. *The Statutes at Large*

The critical statutes are section 13 of the Federal Reserve Act of 1913, Pub.L. No. 63-43, § 13, 38 Stat.

251, 263-64 (1913) ("1913 Act"), the 1916 amendments to that Act, Pub.L. No. 64-270, 39 Stat. 752, 753 (1916) ("1916 amendments"), and section 20 of the War Finance Corporation Act of 1918, Pub.L. No. 65-121, § 20, 40 Stat. 506, 512 (1918) ("1918 Act"). The relevant provisions of these statutes will be found in appendices A, B, and C to this opinion.

As will be seen in Appendix A, section 5202 of the Revised Statutes of the United States, as amended by the 1913 Act, is to be found in the text of section 13 of that Act. The question raised by the parties is whether Congress, in 1916, intended to make the new section 92 a part of section 5202. The critical language in the 1916 amendments reads as follows:

> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding. . . .
>
> * * * * *
>
> "That in addition to the powers now vested by law in national banking associations . . . located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company . . . by soliciting and selling insurance and collecting premiums on policies issued by such company. . . . *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

> "Any member bank may accept drafts or bills of exchange drawn upon it. . . . *Provided further*, That no member bank shall accept such drafts or bills in an amount exceeding at any time the aggregate of one-half of its paid-up and unimpaired capital and surplus."

The middle paragraph above would later be codified as 12 U.S.C. § 92. Thus, on its face, the 1916 amendments had the effect of placing section 92 within section 5202 of the Revised Statutes.

Two years later, Congress enacted the 1918 Act. Section 20 of that Act reads in part as follows:

> Sec. 20. Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:
>
> "Sec. 5202. No national banking association shall at any time . . . except on account of demands of the nature following:
>
> "First. Notes of circulation.
>
> * * * * *
>
> "Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act."

Section 20, in short, sets forth between opening and closing quotation marks what appears as the entire text of the revised section 5202; and as a glance at Appendix C will confirm, the language of section 92 is not to be found in section 5202 as amended.

Under traditional rules of statutory construction, the meaning of section 92's omission is plain; material omitted on reenactment is deemed repealed. *See, e.g.*,

Keppel v. Tiffin Savings Bank, 197 U.S. 356, 373, 25 S.Ct. 443, 449, 49 L.Ed. 790 (1905) ("[I]t cannot in reason be said that the omission . . . gives rise to the implication that it was the intention of Congress to reenact it."); 1A N. Singer, Sutherland Statutory Construction § 23.12, at 355 (4th rev. ed. 1985) ("When the amendatory act purports to set out the original act or section as amended . . . all matter that is omitted in the act or section which the amendment purports to set out as amended, is considered repealed.") (footnotes omitted). Thus the language and punctuation of the Statutes at Large, traditionally construed, support the codifier's conclusion that section 92 was repealed by the 1918 Act.

2. *Did Congress Intend to Repeal Section 92?*

The parties do not dispute the fact that section 92 cannot survive a literal reading of the 1916 and 1918 statutes. They argue, instead, that the section remains valid because Congress did not intend to repeal it. They make their statutory argument in two stages: First, they contend that the apparent deletion was the result of misplaced quotation marks in the 1916 amendments that had the effect of placing section 92 within section 5202 of the Revised Statutes instead of making it part of section 13 of the Federal Reserve Act. They then reason that as section 5202 as amended was not intended to include section 92, its omission from the subsequent revision of section 5202 should not effect a repeal.

They assert, specifically, that a quotation mark should not have appeared at the end of the paragraph marked [1] in Appendix B, and that the quotation mark now appearing after the first colon in paragraph [2] should have been placed at the beginning of that paragraph. Had section 20 been so punctuated, they say, it would be clear that section 5202 itself had not been amended to include the textually unrelated paragraphs marked [3], [4] (section 92), and [5]. Because a change of these quotation marks would make for greater textual consistency in the 1916 amendments, the parties argue that a mistake was made in the printing of the bill, and they cite cases in which courts have adjusted the punctuation of statutes in order to make sense of them. They conclude that the 1918 Act's revision of section 5202 did not delete section 92 because the latter could not properly be considered part of the former.

In support of their view of the 1916 amendments and their interaction with the 1918 Act, the parties direct our attention to a letter and memoranda submitted to the House Banking Committee in 1958 that also conclude that the inclusion of section 92 in section 5202 of the Revised Statutes was inadvertent, and that section 92 was therefore never repealed. *See Financial Institutions Act of 1957: Hearings on S. 1451 and H.R. 7026 Before the Comm. on Banking and Currency of the House of Representatives*, 85th Cong., 2d Sess. 1035, 1036 (1958) ("1958 Hearings") (letter from Comptroller asserting that Congress misplaced quotation marks and that section 92 "remain[s] in full force"); *id.* at 1036-40 (memorandum from Federal Reserve Board reaching same conclusion); *id.* at 1063-65 (Library of Congress's Legislative Reference Service reaching same conclusion); *id.* at 1065-71 (general counsel of Banking Committee reaching same conclusion).

This is an impressive array of witnesses, but the verdict is not unanimous. Committee member (and

future chairman) Wright Patman was of the view that section 92 did not exist. *Id.* at 1062 (section 92 "was repealed in 1918"). Seven years later, the staff of a House Banking subcommittee, after examining the response of the Comptroller to a series of questions, would conclude that

> [w]hether or not the Congress . . . [intended] to perpetuate 12 U.S.C. 92, cannot be ascertained. In any event, however, its intentions would not suffice to overcome the effect of the deletion of § 92 by the inclusion of § 20 in the Act of 1918. . . . Section 92 is non-existent.

Consolidation of Bank Examining and Supervisory Functions 1965: Hearings on H.R. 107 and H.R. 6885 before the Comm. on Banking and Currency of the House of Representatives, Subcomm. on Bank Supervision and Insurance, 89th Cong., 1st Sess. 3, 391 (1965) ("1965 Hearings").

It seems to us that the subcommittee staff had its eyes on the right question; namely, on the effect of the 1918 Act. Whatever the intentions of the 64th Congress in 1916, they are essentially irrelevant to the task at hand. What we are called upon to determine are the consequences of the action taken by the 65th Congress when, two years later, it voted the 1918 Act into law. Section 20 of that Act, which amended section 5202, originated as a floor amendment that was adopted without debate. *See* 1965 Hearings at 391. It seems fair to assume that in drafting section 20 and in voting to enact it, the author and interested members of the House and Senate would have sought out a current text of section 5202 to work from, and not relied on institutional memories of what the text was, or should have been.

At that time, there were only three sources to which they could turn for up-to-date information: the Statutes at Large, which reproduced section 5202's facially unambiguous language, or either of two privately published services. Each of these services reported that as a result of the 1916 amendments, section 5202 of the Revised Statutes contained the provisions to be found in the paragraphs marked [2] through [5] of Appendix B. *See* 9 U.S.Comp.Stat. Ann. § 9764 (West 1916) and 3 U.S.Stat.Ann. § 5202 (T.H. Flood & Co. 1916). Absent concrete evidence to the contrary, we must assume that the 65th Congress understood section 92 to be part of section 5202, and that its exclusion from the amended section 5202 signaled its repeal.

The Comptroller argues, however, that as the purpose of the War Finance Corporation Act of 1918 was to assist the financing of the war effort, a purpose that had no logical relationship to the insurance activities of small town banks, the traditional rule governing provisions omitted in the version of a statute should not be applied to this case. In support of this position, the Comptroller cites two cases interpreting the Clayton Finality Act of 1959, 73 Stat. 243 (1959), *F.T.C. v. Jantzen, Inc.*, 386 U.S. 228, 87 S.Ct. 998, 18 L.Ed.2d 11 (1967), and *F.T.C. v. Standard Motor Products, Inc.*, 371 F.2d 613 (2d Cir.1967), which conclude that "the rule that amendment 'to read as follows' repeals everything omitted . . . must yield where [its] application would be inconsistent with the purposes of the statute." *Standard Motor*, 371 F.2d at 617.

The inconsistency found in those two cases was one where the literal application of a statutory phrase in the Clayton Finality Act would have frustrated a

clearly stated purpose of the amendment. Here, however, there is no inherent contradiction between the deletion of section 92 and facilitating the financing of the American war effort. The two are simply unrelated, and no one argues that the stated purpose of the 1918 Act would have been impeded by the section's repeal.

The Comptroller refers us to cases indicating that we have the authority to rectify Congress's apparent error: When "a mistake in draftsmanship is obvious, courts may remedy the mistake," *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 242 (D.C. Cir.1981); in construing a statute, a court "will disregard the punctuation, or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83, 53 S.Ct. 42, 43-44, 77 L.Ed. 175 (1932). *See also Hammock v. Loan and Trust Co.*, 105 U.S. 77, 84-85, 26 L.Ed. 1111 (1881) (same). In each of these cases, the error distorted the meaning of a statute; where the putative error brings about the repeal of a statute, however, judicial correction entails a far graver task—a task that has generally been shouldered by the legislative branch. *See, e.g., Whitney v. State Tax Comm'n*, 309 U.S. 530, 535-37, 60 S.Ct. 635, 637-38, 84 L.Ed. 909 (1940) (New York legislature altered trust law and inadvertently immunized certain trusts from taxation; gap corrected by statute); *United States v. Riker*, 670 F.2d 987, 988 (11th Cir.1982) (Congress inadvertently repealed statute prohibiting possession of drugs aboard American ships at sea; gap corrected by statute).

3. *Subsequent treatment by Congress, the Comptroller, and the courts*

The parties argue, finally, that the subsequent treatment of section 92 by legislative, administrative, and judicial officials requires us to find that the provision is alive and well. First, they note that Congress in 1982 attempted to delete several provisions from section 92. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub.L. No. 97-320 § 403(b); 96 Stat. 1469, 1510-11 (1982); *see also* S.Rep. No. 536, 97th Cong., 2d Sess. 60 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 3054, 3114 (section 403(b) is " a conforming amendment to 12 U.S.C. § 92, which deletes *existing* reference to the authority of national banks.") (emphasis added). Moreover, at the time the parties filed their supplemental briefs, Congress was considering legislation that, *inter alia*, would repeal section 92. *See* H.R. 6, 102nd Cong., 1st Sess. § 432 (1991). The parties contend that Congress would hardly seek to modify or repeal a statute that no longer existed.

What Congress may now believe, however, is irrelevant. "[I]t is well settled that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Russello v. United States*, 464 U.S. 16, 26, 104 S.Ct. 296, 302, 78 L.E.2d 17 (1983) (internal quotation marks omitted). Section 92 was either repealed in 1918 or it was not; and for those same reasons, it is also immaterial that the Comproller of the Currency has continued to treat the section as valid. Federal agencies have no authority to reinstate a statute that Congress has repealed.

In none of the cases cited by the parties has a court found that section 92 remains valid; rather, they have

presumed that it does. *See, e.g., Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1170 & nn. 18-20 (D.C.Cir.1979); *Independent Ins. Agents of America, Inc. v. Board of Governors of Fed. Reserve System*, 736 F.2d 468, 477 (8th Cir.1984); *First Nat'l Bank of Lamarque v. Smith*, 610 F.2d 1258, 1261 n.6 (5th Cir.1980).

While the Supreme Court made a number of references to section 92 in *Commissioner v. First Security Bank of Utah, N.A.*, 405 U.S. 394, 92 S.Ct. 1085, 31 L.Ed.2d 318 (1972), its decision did not depend on the statute's continued vitality. That case concerned section 482 of the Internal Revenue Act ("IRA"), which, for tax purposes, allows the Commissioner to reallocate income among companies that are under common ownership or control. *See* 26 U.S.C. § 482 (1988). Two national banks, presumably located in communities having in excess of five thousand inhabitants, referred borrowers electing to purchase credit life insurance to an independent insurance company that, in turn, would reinsure the policies with an insurance subsidiary of the holding company that owned the banks. The banks generating the credit life insurance received no compensation for their services; in fact, they had been advised by counsel that it would be unlawful for them to receive any income as a result of their customers' purchase of the insurance. 405 U.S. at 397, 92 S.Ct. at 1088. Nevertheless, the Commissioner of Internal Revenue used his authority under section 482 of the IRA to reallocate forty percent of the insurance subsidiary's premium income to the banks as compensation for originating the credit.

The Supreme Court described the question before it as "whether there was a shifting or distorting of the

Banks' true net income resulting from the receipt and retention by [the insurance subsidiary] of the premiums above described." *Id.* at 400-01, 92 S.Ct. at 1089-90. The Court noted that

> the Banks could never have received a share of these premiums. National banks are authorized to act as insurance agents when located in places having a population not exceeding 5,000 inhabitants, 12 U.S.C.A. § 92.12 [12]

[12] Section 92 of the National Bank Act was enacted in 1916. When the statutes were revised in 1918 and re-enacted, § 92 was omitted. The revisers of the United States Code have omitted it from recent editions of the Code. However, the Comptroller of the Currency considers § 92 to be effective and he still incorporates the provision in his Regulations, 12 CFR §§ 2.1-2.5 (1971).

Id. at 400 and n. 12, 92 S.Ct. at 1090 & n. 12. The Court then observed:

> Although § 92 does not explicitly prohibit banks in places with a population of over 5,000 from acting as insurance agents, courts have held that it does so by implication.
>
> The Comptroller of the Currency has acquiesced in this holding, and the Court of Appeals for the Tenth Circuit expressed its agreement in the opinion below.
>
> * * * * * *
>
> [The Commissioner] does not contest this finding by the Tax Court or the holding in this respect of the Court of Appeals below. *Accordingly, we assume for purposes of this decision* that the Banks were prohibited from receiving insurance-related income. . . .

Id. at 401-02, 92 S.Ct. at 1090-91 (emphasis added) (footnotes omitted).

Based on this assumption, the Court concluded that because the banks did not in fact receive any premium income, and because they would have been precluded from receiving such income whether or not they were under common control with the insurance subsidiary, "the premium income received by [the insurance subsidiary] could not be attributable to the Banks"; the "Commissioner's exercise of his § 482 authority was therefore unwarranted." *Id.* at 407, 92 S.Ct. at 1093.

While it is true, as Justice Blackmun noted in dissent, that the Court had placed "repetitive emphasis on the missing § 92," *id.* at 419, 92 S.Ct. at 1099, its reliance was based on an explicit assumption that the statute prohibited insurance sales by a national bank located in a community with a population of more than five thousand. This assumption as to the application, we believe, extended to the validity of the section. Although the Court had earlier referred to section 92 as authorizing national banks to act as insurance agents in places having no more than five thousand inhabitants, *id.* at 401, 92 S.Ct. at 1090, that reference was qualified by footnote 12, which called attention to section 92's omission from recent editions of the United States Code.

Thus, the Supreme Court never directly addressed the question before us today. A determination of the validity of section 92 was not necessary to its decision in *First Security Bank*; and while the footnote observed that the Comptroller still considered the section to be effective, this does not indicate that the Court adopted such a view.

III. Conclusion

We acknowledge that the parties' analysis of the 1916 amendments is plausible, and that the placement of section 92 in section 5202 of the Revised Statutes might well have been a mistake. Their claim that we must therefore find section 92 valid, however, runs up against the stubborn fact that the troublesome quotation marks are located where they are, not where the parties argue that the 64th Congress intended them to be. Like it or not, they are an integral part of the bill that the President signed into law and that was enrolled in the Statutes at Large. In adopting section 20 of the 1918 Act, the 65th Congress amended section 5202 as it appeared in those Statutes; and the parties have failed to point to any concrete evidence to the contrary, we must conclude that Congress intended the consequences of its actions, and that section 92 has ceased to exist.

Moreover, even if we were persuaded that its repeal was in fact the result of cumulative mistakes by both Congresses (the misplacement of quotation marks in 1916 and the failure to take corrective action in 1918), we would still be hesitant to move into the breach. We recognize that, in order to give effect to a clear congressional intent, federal courts have assumed a rather broad responsibility for correcting flaws in the language and punctuation of federal statutes. There is a point, however, beyond which a court cannot go without trespassing on the exclusive prerogatives of the legislative branch.

We believe we are at that point. It is one thing for a court to bend statutory language to make it achieve a clearly stated congressional purpose; it is quite another for a court to reinstate a law that, intentionally

or unintentionally, Congress has stricken from the statute books. If the deletion of section 92 was a mistake, it is one for Congress to correct, not the courts.

As section 24 of the National Bank Act limits a national bank's activities to those authorized by law, and as the Comptroller cites no authority other than that section for its challenged ruling, we find that ruling not in accordance with law. We therefore reverse and remand the case to the district court with instructions to enter judgment for appellants.

So ordered.

APPENDIX A

Section 13 of Federal Reserve Act of 1913

POWERS OF FEDERAL RESERVE BANKS.

Sec. 13. Any Federal reserve bank may receive. . . .

* * * * *

Any member bank may accept drafts or bills of exchange drawn upon it and growing out of transactions involving the importation or exportation of goods having not more than six months sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half its paid-up capital stock and surplus.

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

The rediscount by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

APPENDIX B

1916 Amendments to Federal Reserve Act of 1913

CHAP. 461.—An Act To amend certain sections of the Act entitled "Federal Reserve Act," approved December twenty-third, nineteen hundred and thirteen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "Federal reserve Act," approved December twenty-third, nineteen hundred and thirteen, be, and is hereby, amended as follows:

* * * * *

That section thirteen be, and is hereby amended to read as follows:

* * * * *

"Any Federal reserve bank may make advances to its member banks on their promissory notes
[1] for a period not exceeding fifteen days at rates to be established by such Federal reserve banks, subject to the review and determination of the Federal Reserve Board, provided such promissory notes are secured by such notes, drafts, bills of exchange, or bankers' acceptances as are eligible for rediscount or for purchase by Federal reserve banks under the provisions of this Act, or by the deposit or pledge of bonds or notes of the United States."

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby
[2] amended so as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount ex-

ceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

"The discount and rediscount and the purchase and sale by any Federal reserve bank of any
[3] bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

"That in addition to the powers now vested by law in national banking associations organized
[4] under the laws of the United States any such
[§ 92] association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company;

. . . *Provided* [sic], *however*, That no such bank shall in any case guarantee . . . the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

"Any member bank may accept drafts or bills of exchange drawn upon it . . . *Provided fur-*
[5] *ther*, That no member bank shall accept such drafts or bills in an amount exceeding at any time the aggregate of one-half of its paid-up and unimpaired capital and surplus."

APPENDIX C

Section 20 of the War Finance
Corporation Act of 1918

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I.—WAR FINANCE CORPORATION.

* * * * *

Sec. 20. Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

"Sec. 5202. No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

'Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association or dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act."

"Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act."

SILBERMAN, Circuit Judge, dissenting:

My position might be thought counterintuitive, but I would decide the case, as did the district court, without reaching the question the majority thinks is a necessary antecedent: whether section 92 is still good law. Appellants did not challenge the validity of section 92. Indeed, after the court ordered the parties to address the issue at oral argument and appellees filed supplemental materials supporting the conclusion that the statute was not repealed, counsel for appellants forthrightly said:

> It would quite obviously be to the appellants' advantage if section 92 were no longer in existence, since there would be no statutory basis for the Comptroller's order. We have researched the issue, both earlier and in light of the court's questions, and we have carefully reviewed the submission made by the government. . . . Given that the statutory issue involves a controversy over the use of punctuation, that Congress obviously intended to amend the law in 1982, and that the Supreme Court has in fact described the law as in effect, while noting its curious history, we have concluded that we cannot advance a substantial argument that section 92 no longer exists.

To be sure, when five months later the panel, having not decided the case, directed the parties to brief the issue, appellants—no doubt at that point realizing that their chances for success were dependent upon indulging the court—did so and partially switched their position, urging us to decide whether section 92 exists. But in answer to our question "whether this court should decide the validity of 12 U.S.C. § 92 in the absense of a challenge to its validity," appellants could only suggest that the question might be juris-

dictional—that if section 92 actually had been repealed in 1918, the case might be "moot" or perhaps might "not even arise." I do not think there is very much to either argument [1] (nor, apparently, does the majority), but I agree with appellants' implicit premise: that unless we determine the validity question to be jurisdictional, we should not decide it.

My colleagues take a different position. Driven by the perceived duty to inquire, on their own, into section 92's validity, they decided the issue. With all due respect, I think the majority is quite wrong in its perception of our judicial obligation. We owe no abstract duty to Congress (or the President) to enforce or not to enforce laws; all of our power derives from our constitutional duty to decide cases and controversies. The issue of section 92's validity was decidedly not part of the "case or controversy" as it was brought to the district court or on appeal to us. It is quite fair to say that we have added it to the case; we have created a controversy that did not exist. That 1 U.S.C. § 204(a) states that "matter set forth" in the Code "establish[es] prima facie the laws of the United States" hardly suggests any independent duty on the part of the judiciary to inquire whether mat-

[1] Although the repeal of a statute moots controversies over the law's validity, *see, e.g., Burke v. Barnes*, 479 U.S. 361, 363-64, 107 S.Ct. 734, 736-37, 93 L.Ed.2d 732 (1987), here the parties *agree* that section 92 is valid, and they have a continuing controversy over the Comptroller's authority to permit national banks to sell insurance nationwide. And the case obviously arises under federal law for purposes of 28 U.S.C. § 1331, because, *inter alia*, the parties have stated a cause of action under the Administrative Procedure Act, 5 U.S.C. §§ 701-06. *See Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n. 4, 106 S.Ct. 2860, 2866 n. 4, 92 L.Ed.2d 166 (1986); *Robbins v. Reagan*, 780 F.2d 37, 42 (D.C.Cir.1985) (per curiam).

ters not appearing in the Code, but which the parties agree continue to be law, remain valid.[2]

I do not think my view has ever been stated better than in the passage the majority quotes from *Carducci v. Regan*, 714 F.2d 171 (D.C.Cir.1983), written by then-Judge Scalia:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.

Id. at 177. The majority, however, trumps Judge Scalia in *Carducci* with Justice Scalia in *Arcadia, Ohio v. Ohio Power Co.*, —— U.S. ——, 111 S.Ct. 415, 112 L.Ed.2d 374 (1990). There the Supreme Court decided that a statute, whose exact application was in dispute, did not even apply to a particular transaction, *see id.* 111 S.Ct. at 418, 422, notwithstanding that no party had even suggested such an argument in the Supreme Court or the court of appeals. Judge Scalia, writing for the Court, did not, however, make clear that the statutory construction adopted by the Court was not argued by the parties at any stage (Justice Stevens pointed it out in his concurring opinion, *see id.* 111 S.Ct. at 422-23). So, importantly, the Court never explained or justified what it did. I do not think that under these circumstances the Court meant to establish a precedent on the point.[3] As in the area of

[2] I do not think the majority is even correct in using the term "presumption," but our "duty" is not affected in any event.

[3] Perhaps because the Court did not wish to set forth a justifying principle that extended beyond that case. The

standing, I think we should follow only what the Court says it does, not merely what it does. *Cf. Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119, 104 S.Ct. 900, 918, 79 L.Ed.2d 67 (1984) (court addressing a jurisdictional issue is not bound by prior decisions that passed on the question *sub silentio*); *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 800 (D.C.Cir.1987) (prior decision that reached merits without discussing standing did not constitute precedent on standing).

The next year in *Kamen v. Kemper Financial Services, Inc.*, —— U.S. ——, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991), the Court, relying on *Ohio Power*, said that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Id.* 111 S.Ct. at 1718. Of course, that statement in a sense begs the question, because the hard analysis comes in determining when an issue or claim is properly before the court. In *Kamen*, the petitioner had brought a shareholder derivative action under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-64, without making a demand for relief upon the board of directors, effectively asserting her right to do so under federal common law. She did not advert to state law until her reply brief in the court of appeals, and thus that court, in shaping a federal common law

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Supreme Court, I gather, weighs docket management factors that the lower federal courts do not encounter. If the Court wants us to adopt a more relaxed stance than I think appropriate, this case may well offer a suitable vehicle to so instruct us.

rule, refused to consider state law. The Supreme Court reversed, holding that the court of appeals could and should look to state law to fashion the contours of the federal law that governed. *See Kamen*, 111 S.Ct. at 1718. In other words, the petitioner in *Kamen* did assert a right not to make a demand under federal law, and the case was decided on that basis; the Supreme Court only thought that the court of appeals should have looked to state law for guidance. That does not seem to me much different than a court relying on a case not cited by the parties to support a contested proposition. And the Court continued: "We do not mean to suggest that a court of appeals should not treat an unasserted claim as waived . . . ." *Id.* 111 S.Ct. at 1718 n. 5. This is that very case where the unasserted claim (that Congress repealed section 92 and therefore the Comptroller's actions under it were unlawful) was waived; it was, in fact, carefully, deliberately, and thoughtfully waived.

The majority's reliance on *Town of South Ottawa v. Perkins*, 94 U.S. 260, 24 L.Ed. 154 (1876), is equally misplaced, because the issue of the statute's validity in that case was raised by the litigants. *See id.* 94 U.S. at 262, 266. Similarly, although the "stipulation of law" cases also cited by the majority establish courts' power to reach nonjurisdictional issues not raised by the parties, they do not suggest that it is always appropriate for courts to do so.

More in point, it seems to me, is *McCormick v. United States*, —— U.S. ——, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991). In that case the Supreme Court refused to consider an appellant's argument, made for the first time in his brief to that Court, that Congress did not intend the anti-extortion Hobbs Act, 18

U.S.C. § 1951, to apply to campaign contributions. *See McCormick*, 111 S.Ct. at 1814 n. 6. Because he concluded that the statute did not apply, Justice Scalia in a concurring opinion said, "I think it well to bear in mind that the statute may not exist." *Id.* at 1820. But he made quite clear that he would not decide the case on that ground. *See id.* The approach taken in *McCormick* accords with other decisions in which courts have declined to consider nonjurisdictional issues not raised by the parties. *See, e.g., Spaulding v. University of Washington*, 740 F.2d 686, 694 n. 2 (9th Cir.) (declining to decide, in a pre-*Garcia* case involving a charge of discrimination under the Equal Pay Act, 29 U.S.C. § 206(d)(1), whether the Act might be unenforceable against the university, a conceded state agency, "[b]ecause the parties neither raise the issue nor contend that it affects our jurisdiction"), *cert. denied*, 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984).

As acknowledged by the *McCormick* majority, *see McCormick*, 111 S.Ct. at 1814 n. 6, some courts recognize an exception to the general principle of judicial restraint that I assert. The "plain error" doctrine is occasionally applied in the civil as well as the criminal context to decide issues not raised by the parties where manifest injustice might otherwise result. *See, e.g., Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465, 469 n. 1 (D.C.Cir.1987) (discussing civil cases invoking the plain error rule in exceptional circumstances where error is obvious and grave); *see also Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976) (appellate court is justified in resolving issue not raised below if "the proper resolution is beyond any doubt" or " 'injustice

might otherwise result' " (quoting *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941))). But I think that a venue is hardly open to us here, since—as appellants pointed out in their post-argument brief—for over seventy years the Comptroller, Congress, federal courts, and even the Supreme Court, *see Commissioner of Internal Revenue v. First Security Bank*, 405 U.S. 394, 400 n. 12, 92 S.Ct. 1085, 1090 n. 12, 31 L.Ed.2d 318 (1972), have assumed that the statute remains in effect.[4] (It actually appears in United States Code Service. *See* 12 U.S.C.S. § 92.) Injustice is more likely to result from our reaching the issue than from our declining to do so, because the question of section 92's validity affects many entities, including members of the insurance and banking industries who have relied on the law's continued existence and who, having no notice that the question might be decided, had no opportunity to make their views known in this case. I would therefore affirm the district court on the ground that the Comptroller's ruling is a reasonable interpretation of section 92, and note that we do not decide the significance of Congress' actions in 1918.

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[4] *See* Maj.Op. at 737-39. Although I agree that subsequent assumptions by the executive, legislative, and judicial branches cannot establish Congress' intent in 1918, I do think that such widespread acceptance of section 92's existence precludes us from reaching a different conclusion in the absence of a challenge by one of the parties.

APPENDIX B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 90-5209, 90-5214

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., ET AL., APPELLANTS

v.

ROBERT L. CLARKE, Comptroller of the Currency, ET AL.

NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, ET AL., APPELLANTS

v.

ROBERT L. CLARKE, ET AL.

May 22, 1992

Before MIKVA, Chief Judge, WALD, HARRY T. EDWARDS, RUTH BADER GINSBURG, SILBERMAN, BUCKLEY, STEPHEN F. WILLIAMS, D.H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, Circuit Judges.

On Appellees' Suggestions for
Rehearing En Banc

ORDER

PER CURIAM.

Appellees' Suggestions for Rehearing *En Banc* have been circulated to the full Court. The taking of a vote was requested and responses were received. Thereafter, a majority of the judges of the Court in regular active service did not vote in favor of the suggestions. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

SILBERMAN, STEPHEN F. WILLIAMS and D.H. GINSBURG, Circuit Judges, would grant the suggestion of appellee United States National Bank of Oregon, limited to Point II thereof.

Separate statement filed by SENTELLE, Circuit Judge, concurring in the denial of rehearing *en banc*, with whom BUCKLEY and KAREN LECRAFT HENDERSON, Circuit Judges, join.

Separate statement filed by SILBERMAN, Circuit Judge, dissenting from the denial of rehearing *en banc*, with whom STEPHEN F. WILLIAMS and D.H. GINSBURG, Circuit Judges, join.

Separate statement filed by RANDOLPH, Circuit Judge.

SENTELLE, Circuit Judge, concurring in the denial of rehearing *en banc*, with whom Circuit Judges BUCKLEY and KAREN LECRAFT HENDERSON join:

I write separately expressing concurrence in the Court's denial of rehearing *en banc* to respond briefly to a theory advanced by our dissenting colleagues.

Our colleagues question the "judicial power" of a federal court to decide an issue of law concededly dispositive of the case where parties have not raised the issue. I think it most apparent that federal courts *do* possess this power. The alternative is that the parties could force a federal court to render an advisory opinion. What the dissenters in effect argue is that the parties can stipulate to the state of underlying law; frame a law suit, assuming that stipulation; and obtain from the court a ruling as to what the otherwise dispositive law would be if the stipulated case were in fact the law. Indeed, that is precisely what would have occurred in this case had the panel not, *sua sponte*, raised the question of the repeal of section 92.

It has long been recognized that we are "free to ignore" stipulations as to matters of law. *NLRB, Local 6 v. FLRA*, 842 F.2d 483, 485 n. 6 (D.C. Cir. 1988); *see also Barry v. United States*, 865 F.2d 1317, 1326 (D.C.Cir.1989) ("A concession by a party as to a matter of law, unlike a stipulation of fact, need not hinder a court from finding the proper legal view.") (Sentelle, J., dissenting on other grounds). Thus, by declining to argue that Congress repealed the section, appellants cannot stipulate into existence a repealed statute and then compel the Court to compliantly advise the parties what it would do if that statute existed. "[I]t is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions.'" *Flast v. Cohen*, 392 U.S. 83, 96, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947 (1968) (quoting C. WRIGHT, FEDERAL COURTS 34 (1963)).

The soundness of this rule is suggested by the following: If the parties can by stipulation bring into

existence section 92 and have us decide whether the Comptroller properly exercised his authority under that statute, what is to prevent the parties from next asking us whether the delegation of that authority to the Comptroller was constitutional?

That parties have assumed and the Comptroller has enforced the repealed statute for over seventy years seems to me irrelevant to the question. The question is not how long the parties assumed a certain state of the law, but whether that state of the law is merely an assumption. The passage of time, the acquiescence of the parties, the assumptions of officials, even all taken together cannot enact a statute. Legislation only comes into existence through bicameral congressional enactment and presentment to the President of the United States. U.S. Const. art. I, § 1 and § 7, cl. 2 & 3; *INS v. Chadha*, 462 U.S. 919, 946, 103 S.Ct. 2764, 2781, 77 L.Ed.2d 317 (1983). No stipulation by an executive official purporting to operate under a statute and a party affected by the official's actions can bring that statute into existence, even for purposes of a judicial decision as to its construction.

I agree with the dissent that there are obvious limits on the power of the Court—I disagree with the dissent as to what those limits are. I am convinced that it is within the Court's power to determine the existence of a statute essential to the determination of a case or controversy whether or not the parties assume or stipulate that the statute does or does not exist. At bottom, I do not think it within the power of the Court to render an advisory opinion on the construction of a statute whose existence depends on the failure of the parties to assert its invalidity.

SILBERMAN, Circuit Judge, dissenting from the denial of rehearing *en banc*, with whom Circuit Judges STEPHEN F. WILLIAMS and D.H. GINSBURG join:

We think this case should be reheard *en banc*, but the rehearing should be confined to an issue raised only by appellee United States National Bank of Oregon: did the court properly reach and decide the question whether the statutory provision on which the Comptroller based his regulation, and which has been enforced for over 70 years, was repealed by Congress in 1918? As the dissenting opinion points out, the appellant trade associations, which represent insurance agents and underwriters, deliberately refused to argue (waived) any claim that Congress did repeal section 92. Even when the panel ordered supplementary briefing directed to that issue five months after argument, the appellants declined to argue that Congress repealed the section. Since the question is not jurisdictional, we do not see how it can be appropriate for a federal court, *sua sponte*, to decide it, and we fear that the implications of what might be thought a rather expansive view of federal judicial power could be profound indeed.

Almost any case brought rests on certain uncontested legal assumptions that may be thought to be logical antecedents to the issues in dispute. A court is not free, however, to examine itself any of those legal assumptions (if non-jurisdictional) just by asserting that they are "essential to the determination." Concurrence at 2. That would mean that a lawsuit is framed by a court's notion of the logical way to think about a legal problem, and not by the parties' controversy. A majority of this court rejected that concept in a statement of Judge Bork joined by Judges Ginsburg, Scalia, Starr, Silberman, and Buck-

ley concurring in the denial of rehearing *en banc* in *King v. Palmer*, 778 F.2d 878, 883 (D.C.Cir.1986). The United States, concerned that a panel of this court had accepted and ratified what the United States thought might be an improper expansion of Title VII (to cover a claim for relief "for sex-based discrimination" by a woman who alleged that she was denied a promotion in favor of another woman who had a sexual relationship with their supervisor, *id.*), wished time to consider whether to file an *amicus* brief supporting rehearing. We denied rehearing because the District of Columbia, the defendant, had not challenged the plaintiff's expansive view of Title VII but rather, assuming coverage, argued that its conduct did not violate the statute. Judge Bork said:

> Rehearing of that issue *en banc* would be inappropriate because no party challenged that application of Title VII on appeal and the issue was not briefed or argued to the panel. . . . Because the point was *not* before the panel on appeal there is no occasion to address the issue *en banc*.

Id. (emphasis in original). In other words, the statement treated the panel's approval of that interpretation, although phrased as a holding, as limited only to that case and therefore not binding precedent. The *en banc* majority thought that even if it disagreed with what the concurrence terms the parties' "stipulation of law," it would be inapropriate so to hold because the issue was not contested in the case.

With all due respect to our concurring colleagues, we think they have the advisory opinion point exactly backwards. An advisory opinion is "an abstract determination by the Court of the validity of a statute . . . or a decision advising what the law would be on

a hypothetical state of facts." *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, 288 U.S. 249, 262, 53 S.Ct. 345, 348, 77 L.Ed. 730 (1933). When a court issues an opinion on an uncontested, nonjurisdictional matter of law like the one here, it has made "an abstract determination . . . of the validity of a statute" and issued an advisory opinion—although to the world rather than the parties—because the issue was not part of the case or controversy.[1]

The government makes a forceful argument that the panel, having reached the question whether section 92 was repealed in 1918, decided the matter incorrectly. Given the importance of this issue to the banking and insurance businesses throughout the country, we would ordinarily be inclined to view the government's petition sympathetically. We do not so regard the government's petition here, because, having vigorously argued before the panel that the court should not reach the "repeal" question, the government now quietly drops that argument and urges us to do that which it originally contended was improper —reach the repeal issue but decide it, instead, in the government's favor.

We full well recognize that the panel's opinion *itself* created legal uncertainty concerning the sale of insurance by banks located and doing business in small towns (which has been the settled practice for most of this century), and, therefore, it would be only nat-

[1] It seems to us that the phrase "stipulates to a matter of law" is too general to be useful in consideration of this kind of problem. We would agree, for instance, that if both parties simply misread a Supreme Court decision in their briefs we would not be bound to that interpretation. But that is far removed from a party's failure to bring an analytically separate claim that we thought was available. We are not free to add such a claim to a case.

ural for the Comptroller to wish a speedy *judicial* action to dispel this uncertainty. But we are frankly disappointed that the government as a whole would not have thought the question of judicial power—surely, in the long run—to be more important.

In any event, the Supreme Court may well be in a better position to deal with both issues. Now that the insurance industry, disinclined to look a gift horse in the mouth, is willing to support the panel's opinion and argue that Congress did repeal section 92, the Supreme Court could grant *certiorari* on that issue and, in light of its supervisory role over federal courts, still give guidance on the question that we think even more significant.

RANDOLPH, Circuit Judge:

It has become customary for members of this court to issue statements concurring in or dissenting from denials of rehearing *en banc*. I doubt the propriety of this practice. Such statements are rarely confined to setting forth the author's reasons for thinking or not thinking the case important enough to warrant *en banc* treatment. Although the statements may take this form, more often than not they contain expressions of a different sort. Judges commonly use denials of rehearing *en banc* to declare their views on the merits of the case. Those who were not on the original panel announce what they would have decided if only they had been called upon to rule. Judges who were members of the panel express afterthoughts, or respond to criticism contained in the *en banc* statements of other judges, or explain what the panel "really" meant. All of this may be good for the soul. But it rubs against the grain of Article III's ban on advisory opinions. The manner in which these *en banc* "bulletins" are formulated does not simulate the process of

the court when it is actually deciding a case. If recurring issues are addressed, *en banc* statements may be tantamount to prejudgments. Another common practice on denials of rehearing *en banc* is, to my mind, also inappropriate. It occurs when the judge steps out of the robe and into the role of an advocate, urging the Supreme Court to take the case on certiorari and correct the panel's judgment.

Many years ago two wise judges found it a "dubious policy" if "any active judge may publish a dissent from any decision, although he did not participate in it and the Court has declined to review it *en banc* thereafter . . . especially since, if the issue is of real importance, further opportunities for expression will assuredly occur." *United States v. New York, New Haven & Hartford R.R.*, 276 F.2d 525, 553 (2d Cir.) (statement of Friendly, J., joined by Lumbard, C.J.), *cert. denied*, 362 U.S. 961, 80 S.Ct. 877, 4 L.Ed.2d 876 & 964, 80 S.Ct. 877 4 L.Ed.2d 878 (1960).

I fully agree with Judge Friendly and Judge Lumbard. In my view, denials of rehearing *en banc* are best followed by silence. They should not serve as the occasion for an exchange of advisory opinions, overtures to the Supreme Court, or press releases.

Before: SILBERMAN, BUCKLEY, HENDERSON, Circuit Judges.

ORDER

Upon consideration of the petitions for rehearing of appellees, it is

> Ordered, by the Court that the petitions are denied.
>
> Circuit Judge SILBERMAN would grant the petition for rehearing of the United States National Bank of Oregon.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. Nos. 86-3042, 86-3045

NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, ET AL., PLAINTIFFS

v.

ROBERT CLARKE, ET AL., DEFENDANTS,

and

UNITED STATES NATIONAL BANK OF OREGON, DEFENDANT-INTERVENOR

INDEPENDENT INSURANCE AGENTS OF AMERICA, ET AL., PLAINTIFFS

v.

ROBERT L. CLARKE, ET AL., DEFENDANTS

and

UNITED STATES NATIONAL BANK OF OREGON, DEFENDANT-INTERVENOR

May 8, 1990

OPINION

JOHN H. PRATT, District Judge.

I. *Introduction*

The above action is only the latest chapter in the long running battle for turf on the part of two powerful industries, each of which is subject to governmental regulation. In this case, the insurance industry seeks protection from incursions into its claimed territory by the commercial banking industry. On behalf of life, health, property, and casualty insurance agents throughout the United States, various trade associations brought this consolidated action for declaratory and injunctive relief against the Office of the Comptroller of the Currency ("OCC"), the Comptroller himself, and the United States.[1] After the complaints were filed, the United States Bank of Oregon ("USBO"), a national bank chartered under the National Bank Act, 12 U.S.C. §§ 21-216d (1988) (sometimes "NBA"), intervened as an additional defendant.

At issue is whether the Comptroller reasonably concluded that section 92 of the NBA, *id.* § 92,[2] author-

[1] We hereby grant defendants' unopposed request that the complaint, which alleges nothing against the United States *eo nomine*, be summarily dismissed against that party.

[2] It is worth noting that this section no longer appears in the United States Code. Enacted by Act of Sept. 7, 1916, ch. 461, 39 Stat. 753 (1916), it apparently was inadvertently repealed in 1918. *See* Act of Apr. 5, 1918, ch. 45, § 20, 40 Stat. 512 (1918). However, since Congress, other courts, and the Comptroller have presumed its continuing validity, *see, e.g., Commissioner v. First Sec. Bank*, 405 U.S. 394, 401 & n. 12, 92 S.Ct. 1085, 1090 & n. 12, 31 L.Ed.2d 318 (1972); *First Nat'l Bank v. Smith*, 610 F.2d 1258, 1261 n. 6 (5th Cir.1980); *Saxon v. Georgia Ass'n of Indep. Ins. Agents*, 399 F.2d 1010, 1013 (5th Cir.1968); Garn-St. Germain Depository Institutions Act of 1982, Pub.L. No. 97-320, 96 Stat.

ized USBO, through a subsidiary bank insurance agency, to solicit and sell insurance to customers located throughout the country. Plaintiffs contend that the Comptroller's decision permits USBO and its parent, U.S. Bancorp, a bank holding company registered under the Bank Holding Company Act of 1956, *id.* §§ 1841-1849 (1988) (sometimes "BHCA"), to violate alleged geographic restrictions on insurance activities contained in both the NBA and the BHCA.[3] *Id.* §§ 92, 1843(c)(8). There being no dispute as to any material fact, defendants and USBO moved for summary judgment or dismissal, and plaintiffs cross-moved for summary judgment. The issues have been fully briefed by the parties and the amici curiae.[4]

1511 (1982) [hereinafter Garn-St. Germain Act] (purporting to amend § 92); 12 C.F.R. § 7.7100 (1989), we will assume that the statute exists *in proprio vigore*.

[3] Defendants claim that two plaintiffs, the National Association of Life Underwriters ("NALU") and the Oregon Life Underwriters Association ("OLUA"), lack standing because they represent insurance underwriters rather than agents. From plaintiffs' uncontested response, however, it is clear that NALU and OLUA represent insurance agents, not underwriters. As such, they plainly have standing to proceed. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403, 107 S.Ct. 750, 759, 93 L.Ed.2d 757 (1987) ("[C]ompetitors who allege an injury that implicates the policies of the National Bank Act are very reasonable candidates to seek review of the Comptroller's rulings.").

[4] Plaintiffs have requested leave to file two supplemental exhibits. Proposed Exhibit 16, the text of a June 10, 1987, address by Richard V. Fitzgerald, Chief Counsel of the Comptroller, is a *post hoc* commentary on the mental processes that led to the Comptroller's decision, and thus is not relevant to this case. *See Camp v. Pitts*, 411 U.S. 138, 142, 93

II. *Background*

A. USBO's "New Activities" Proposal

As a national bank, USBO is subject to the regulatory jurisdiction of the Comptroller, the principal expositor of the NBA. *See Clarke v. Securities Industry Association*, 479 U.S. 388, 403-04, 107 S.Ct. 750, 759-60, 93 L.Ed.2d 757 (1987) (citations omitted); *First National Bank v. Smith*, 610 F.2d 1258, 1264 (5th Cir.1980); 12 U.S.C. §§ 1-216d; 12 C.F.R. §§ 1.1, 4.1a-4.-11 (1989). Under OCC regulations, a national bank wishing to perform "new activities" through a subsidiary must submit a written proposal to the Deputy Comptroller for the district in which the bank's principal office is located. 12 C.F.R. § 5.34(d)(1)(i). Upon receiving such a proposal, the Comptroller evaluates whether the activities would "exceed those legally permissible for a national bank operating subsidiary." *Id.* § 5.34(d)(1)(ii). If the Comptroller requires more than thirty days for this evaluation, he may extend the review period, in which case the bank must await "written notifications" before engaging in the "new activities." *Id.*

U.S. Bancorp, USBO's parent, is regulated by the Federal Reserve Board (sometimes the "Board"),

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S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973) (per curiam) (focal point for judicial review of Comptroller's decision should be administrative record already in existence, not some new record); *Environmental Defense Fund v. Costle*, 657 F.2d 275, 284 (D.C.Cir.1981) (judicial review of agency action normally confined to full administrative record before agency at time decision was made). Accordingly, leave to file this exhibit is denied. Leave is granted with respect to proposed Exhibit 17, a re-typed version of a previously filed letter from defendants' counsel.

which administers the BHCA.[5] *See Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419, 85 S.Ct. 551, 556-57, 13 L.Ed.2d 386 (1965); *Northeast Bancorp, Inc. v. Board of Governors*, 849 F.2d 1499, 1501 (D.C.Cir.1988); 12 U.S.C. §§ 1841-1849; 12 C.F.R. § 225.1. U.S. Bancorp did not submit an application to the Board concerning the proposed "new activities" of USBO. Consequently, the Board was never requested to nor did it approve U.S. Bancorp's indirect involvement in certain insurance activities.

Pursuant to OCC regulations, USBO, whose principal office is in Portland, Oregon, submitted a "new activities" proposal to the OCC's Western District on October 16, 1984. USBO sought to offer, through its subsidiary U.S. Bank Insurance Agency, Inc. ("Bank Agency"), "a full range of insurance products" from a branch office of USBO in the small town of Banks, Oregon.[6] Letter from T. Dalrymple to Billy C. Wood (Oct. 16, 1984). USBO relied on section 92 of the NBA and a December 1, 1983, opinion letter[7] to conduct the proposed activities. *See id.*

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[5] Although plaintiffs allege violations of the Bank Holding Company Act, neither U.S. Bancorp nor the Federal Reserve Board is a party to this action.

[6] The 1980 census population of Banks was 489.

[7] In 1983, USBO contacted the Assistant Commissioner of the Oregon Department of Commerce concerning the possibility of USBO's acting as an insurance agent through branches in small Oregon communities. The Commissioner requested an opinion from the OCC as to the types of activities authorized by 12 U.S.C. § 92. Letter from Robert E. Miller to Joe Pogar, Regional Counsel (Oct. 7, 1983). The OCC's resultant opinion letter stated, in pertinent part: "[A]

The primary question raised by the proposal was whether any geographic restrictions applied to the solicitation or sale of insurance authorized by section 92 of the NBA. That section provides that any national bank:

> located and doing business *in any place the population of which does not exceed five thousand inhabitants*, as shown by the last preceding decennial census, *may, under such rules and regulations as may be prescribed by the Comptroller . . ., act as the agent for any fire, life, or other insurance company authorized* . . . to do business in [the state in which the bank is located], *by soliciting and selling insurance and collecting premiums on policies issued by such company* . . . .

12 U.S.C. § 92 (emphasis added).[8] A similar provision applies to bank holding companies. *See id.* § 1843(c)(8)(C). Section 4(c)(8) of the BHCA

national bank or its office may act as an insurance agent without geographic restriction to the community [in which] it is located. However, whether a national bank or its office may act as an insurance agent on an interstate basis is an unsettled issue." Letter from Debra A. Chong, Senior Attorney, Western District, to Robert E. Miller at 1 (Dec. 1, 1983) [hereinafter Chong Letter].

[8] As originally enacted in 1916, § 92 also authorized such national banks to act as brokers or agents "in making or procuring loans on real estate located within one hundred miles of the" community. 39 Stat. 753 (1916). This provision was deleted in 1982, Garn-St. Germain Act, *supra* note 2, 96 Stat. 1511, because Congress considered it "obsolete and unjustifiably restrictive." H.R.Conf.Rep. No. 899, 97th Cong., 2d Sess. 89 (1982); *accord* S.Rep. No. 536, 97th Cong., 2d Sess. 27 (1982) [hereinafter Senate Report], U.S.Code Cong. & Admin.News 1982, 3054, 3081.

prohibits a bank holding company from engaging in, or acquiring and retaining "shares of any company" engaged in, nonbanking activities unless the Board determines that such activities are "so closely related to banking . . . as to be a proper incident thereto." *Id.* § 1843(c)(8); *see Independent Insurance Agents of America, Inc. v. Board of Governors*, 835 F.2d 1452, 1454 (D.C.Cir.1987). Subject to a few limited exceptions, the BHCA precludes the Board from finding that the provision of "insurance as a principal, agent, or broker" is "closely related to banking." *See* 12 U.S.C. § 1843(c)(8). One exception is "any insurance agency activity in a place" with "a population not exceeding five thousand (as shown by the last preceding decennial census)." *Id.* § 1843(c)(8)(C); *see Independent Insurance Agents*, 835 F.2d at 1455 nn. 4-5. This provision was added to the BHCA in 1982,[9] and was "intended to conform to" Board regulations that already permitted such activity,[10] "as well as the

[9] Garn-St. Germain Act, *supra* note 2, 96 Stat. 1536-37.

[10] Beginning in 1971, the Board determined that certain types of insurance activities were "so closely related to banking" that bank holding companies could engage in them under the BHCA. "One of these was the sale of any insurance in a community that had a population not exceeding 5,000." *Independent Ins. Agents*, 835 F.2d at 1454. In 1979, the Board began to limit this exemption to bank holding companies that (1) had their principal place of business in a small town; and 2) operated another subsidiary serving the public in the small town in which they wished to sell insurance. *See id.* In 1986, after passage of the Garn-St. Germain Act, the Board deleted the principal place of business requirement from its new regulations, having determined that it was not mandated by either the text or the purpose of § 4(c)(8). 12 C.F.R. § 225.25(b)(8)(iii) (1989); *see Independent Ins.*

authority in" section 92 of the NBA. Senate Report, *supra* note 8, at 38, U.S.Code. Cong. & Admin.News 1982, p. 3092.

Since 1963, over twenty-five years ago, the Comptroller has applied section 92 to any branch office "located in a community . . . of less than 5,000," regardless of whether the bank's principal office is located in a larger community. 12 C.F.R. § 7.7100 (first codified in 1971).[11] Similarly, a Board regulation allows

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Agents, 835 F.2d at 1455. The D.C. Circuit recently upheld the Board's decision against an attack waged by many of the same trade associations that are plaintiffs in this case. *See Independent Ins. Agents*, 835 F.2d at 1456-57.

[11] After 23 years of silence, plaintiffs now assert that this interpretive ruling is invalid. They claim that Congress could not have intended to authorize insurance activities outside a bank's "headquartered location" because in 1916, when § 92 was enacted, branch banking did not exist. Plaintiffs emphasize that the McFadden Act, 12 U.S.C. §§ 36, 81, which authorizes national banks to conduct business through branch offices, was not passed until 1927.

This challenge, even if meritorious, is barred by laches. *Independent Bankers Ass'n of Am. v. Heimann*, 627 F.2d 486, 488 (D.C.Cir.1980). Plaintiffs are trade associations "charged by [their] members with anticipating the impact of government rulings" concerning insurance activities by banks. *Id.* at 488. As such, their long delay in challenging this ruling is patently unreasonable. *See id.* (12 years held unreasonable). Further, since 1963, some national banks have invested substantial capital in insurance agency branches "that meet the ruling's requirements." *Id.; see, e.g.*, Letter from Michael J. O'Keefe, District Counsel, Midwestern District (June 19, 1986), Ex. 4 to Pls.Mem. [hereinafter O'Keefe Letter]; Letter from David H. Baris, Regional Counsel (Dec. 29, 1978), Ex. 2 to Pls.Mem. [hereinafter Baris Letter]. Equity will not protect those who "through years of silence ha[ve] created an impression of acquiescence that has led others to make

a subsidiary of a bank holding company to engage "in any insurance agency activity in a place" the population of which does not exceed 5,000, provided the subsidiary "has a lending office" there. *Id.* § 225.25(a), (b)(8)(iii).[12] It is the Board's policy, however, that solicitation and sales must be restricted to that place "and to other areas of less than 5,000 adjacent to" it. 51 Fed. Reg. 36,201, 36,206 (Oct. 9, 1986); *see also First United Bancshares, Inc.*, 73 Fed.Res. Bull. 162 (1987).

B. The Comptroller's Approval Letter

The Comptroller notified USBO that review of its proposal would extend beyond thirty days, and that USBO could not conduct the proposed insurance activities unless the Comptroller communicated in writing that he had no objection. Letter from Rufus O. Burns, Jr., District Administrator, Western District, to T. Dalrymple (Oct. 24, 1984). Almost two years later, on August 18, 1986, the Comptroller approved

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substantial financial commitments." *Independent Bankers v. Heimann*, 627 F.2d at 488.

We also note that plaintiffs' challenge is based on a false premise. Contrary to their assertion, branch banking was not unknown in 1916. At the turn of the century, five national banks and 82 state banks operated a total of 119 branches. *Firts Nat'l Bank v. Walker Bank & Trust*, 385 U.S. 252, 257, 87 S.Ct. 492, 495, 17 L.Ed.2d 343 (1966) (citation omitted). By the end of 1923, several years prior to the enactment of the McFadden Act, 91 national banks and 580 state banks operated a total of 2,054 branches. *Id.* (citation omitted).

[12] The D.C. Circuit recently upheld this regulation against an attack waged by many of the same trade associations that are plaintiffs in this case. *See Independent Ins. Agents*, 835 F.2d at 1456-57. *See supra* note 10.

USBO's proposal and, in so doing, authorized Bank Agency, the subsidiary of USBO, "to sell insurance to customers residing outside" Banks, Oregon. *See* Letter from Judith A. Walter, Senior Deputy Comptroller for National Operations, to T. Dalrymple at 4 (Aug. 18, 1986) [hereinafter "Approval Letter" or "Letter"].

The Approval Letter analyzed the text and legislative history of section 92, as well as relevant OCC rules and policies. Section 92, it found, was silent concerning the sale of insurance "to persons and businesses located in different states." *Id.* at 2-3. The Letter then explained that the original statute had included an express geographic restriction (100 miles) applicable to loans on real estate.[13] According to the Letter, this restriction, coupled with the absence of one on insurance activities, indicated "congressional intent not to limit geographically a bank's market area for its insurance products." *Id.* at 3 (relying on *expressio unius est exclusio alterius*).

The Approval Letter next explained that section 92's legislative history—essentially only a 1916 letter from Comptroller Williams to the Senate Banking and Currency Committee—did "not directly address [the] geographic limitations" at issue. *Id.* Williams drafted and recommended the passage of what ultimately became section 92's insurance provision. *See id.; see also* 53 Cong.Rec. 11001 (1916).[14] Based on

[13] *See supra* note 8.

[14] Williams recommended that insurance privileges be granted to national banks located and doing business in communities of 3,000 or fewer inhabitants. *See* 53 Cong.Rec. 11001. Prior to passage, Congress changed the operative figure to 5,000. *See id.* at 11153.

his comments, the Approval Letter concluded that the primary purpose of the insurance provision was to provide additional sources of revenue to national banks that, due to their location in small towns, "were having problems deriving a reasonable profit from their banking business." Approval Letter at 4 (citations omitted).

Allowing sales to customers outside the local population would further this purpose, the Letter reasoned, because the local population's demand for insurance might be too small "to improve significantly the bank's profitability. . . ." *Id.* In this regard, the Letter emphasized that the Comptroller had never imposed any geographic restrictions on the insurance activities of small town national banks, and that no relevant restrictions existed under Oregon law. *Id.* The Letter did not address the proposal's legality under the BHCA.

Based on this analysis, the Approval Letter authorized Bank Agency to "sell insurance . . . to existing and potential customers regardless of where [they] are located." *Id.* at 5. The only qualification was that Bank Agency "could not sell insurance . . . to customers located in a state where the" underwriter was not licensed to do business. *Id.* Subsequently, Bank Agency began offering insurance to customers in a number of states. The Federal Reserve Board has never taken any action regarding U.S. Bancorp's indirect involvement in these activities.[15]

Plaintiffs assert that the Approval Letter, by authorizing geographically unlimited sales of insurance,

[15] The Board clearly has the power to act. *See* 12 U.S.C. § 1844(b), (c), (e).

sanctions violations of section 92 of the NBA and section 4(c)(8) of the BHCA.[16] They seek to enjoin the Comptroller to withdraw the Approval Letter and to refrain from granting similar approval to any other national bank. While plaintiffs concede that we lack jurisdiction to adjudicate their BHCA claim,[17] they urge us to find that the Comptroller erroneously approved USBO's proposal without providing the Board an opportunity to consider its legality under the BHCA. We turn first to plaintiffs' claim under the NBA.

III. *Plaintiffs' Claim Under the National Banking Act*

A. The Applicable Standard of Review

It is undisputed that the Approval Letter of August 18, 1986, is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1988). *See Camp v. Pitts*, 411 U.S. 138, 140, 93 S.Ct. 1241, 1243, 36 L.Ed.2d 106 (1973) (per curiam); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 156-58, 90 S.Ct.

[16] Originally, plaintiffs' wide ranging complaint also alleged that the Approval Letter violated the McFadden Act's restrictions on "branch banking," 12 U.S.C. §§ 36, 81. Plaintiffs dropped this claim after USBO affirmed that Bank Agency was the only branch engaged in the insurance activities at issue. *See* Pls.Mem. at 9 n. 6.

[17] Pls.Reply Mem. at 18-19. The Board has exclusive jurisdiction in the first instance to determine the merits of a BHCA challenge, 12 U.S.C. § 1842, with judicial review only in a court of appeals, *id.* § 1848. *American Ins. Ass'n v. Clarke*, 865 F.2d 278, 288 (D.C.Cir.1988) (citing *Whitney Nat'l Bank*, 379 U.S. at 419-23, 85 S.Ct. at 556-59).

827, 831, 25 L.Ed.2d 184 (1970). However, since no hearing or formal findings were required for the Comptroller to pass on USBO's proposal, his decision can be overturned only if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Camp v. Pitts*, 411 U.S. at 140-42, 93 S.Ct. at 1243-44 (citing 5 U.S.C. § 706(2)(A)); *see Citizens to Preserve Overton Park, Inc v. Volpe*, 401 U.S. 402, 413-17, 91 S.Ct. 814, 822-24, 28 L.Ed.2d 136 (1971). Moreover, because we are called upon to review an agency's interpretation of its governing statute,[18] we are required to apply the landmark test announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Sullivan v. Everhart*, —— U.S. ——, 110 S.Ct. 960, 964, 108 L.Ed.2d 72 (1990).

Under *Chevron*, our first inquiry is whether Congress has directly addressed the issue of geographic restrictions on insurance sales under section 92. *Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* 467 U.S. at 842-43, 104 S.Ct. at 2781. However, "if the statute is silent or ambiguous with respect to [this] issue," we must determine whether the Comptroller's construction is "permissible," *id.* 467 U.S. at 843, 104 S.Ct. at 2781, that is, whether it is "rational and consistent with the statute." *NLRB*

[18] *See Clarke v. Securities Indus. Ass'n*, 479 U.S. at 403-04, 107 S.Ct. at 759-60 (citations omitted); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 626-27, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971) (citation omitted).

v. United Food & Commercial Workers Union, 484 U.S. 112, 123, 108 S.Ct. 413, 420-21, 98 L.Ed.2d 429 (1987). In so doing, we must give "great weight" to any reasonable interpretation the Comptroller has adopted. *Clarke v. Securities Industry Association*, 497 U.S. at 403-04, 107 S.Ct. at 759-60 (citations omitted); *Investment Co. Institute v. Camp*, 401 U.S. 617, 626-27, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971) (citation omitted); *see Securities Industry Association v. Board of Governors*, 821 F.2d 810, 813 (D.C.Cir.1987) (citations omitted), *cert. denied*, 484 U.S. 1005, 108 S.Ct. 697, 98 L.Ed.2d 649 (1988).

B. Chevron Step One

Plaintiffs contend that the Comptroller's interpretation contradicts the plain meaning of the statute. According to plaintiffs, section 92 clearly limits insurance sales and solicitation to the small community in which the bank's selling office is located, in this case Banks, Oregon. This of course misstates the facts. We agree with the Comptroller that the statute is silent on this issue.

As in all cases of statutory interpretation, we begin by examining the statutory language itself. *Investment Co. Inst. v. Conover*, 790 F.2d 925, 933 (D.C. Cir.), *cert. denied*, 479 U.S. 939, 107 S.Ct. 421, 93 L.Ed.2d 372 (1986); *see K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313 (1988) (citation omitted). Section 92 plainly permits Bank Agency, under such regulations as the Comptroller may prescribe, to solicit and sell insurance for any insurance company authorized to do business in Oregon. *See* 12 U.S.C. § 92. Beyond this, the statute says little. It does not refer to the market Bank Agency may serve, much less restrict solicitation or sales to the residents of Banks. *See id.* This silence, coupled with the express delegation of rulemaking authority to the Comptroller, suggests that Congress explicitly "left a gap for the [Comptroller] to fill." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781.

Plaintiffs argue, however, that a geographic restriction is implicit in the statute's requirement that the selling office be "located and doing business" in a small community. 12 U.S.C. § 92. Plaintiffs stretch the text too far. The phrase "located and doing business" plainly refers to the location of Bank Agency, not the customers to whom it may sell. Certainly USBO may accept deposits or extend credit to customers located outside Banks. Nowhere else does the NBA prohibit a national bank from offering its services to customers residing outside the community in which it is located. Indeed, an "affirmative indication" is required "to justify [a statutory] interpretation that would permit a national bank to engage in a business but" prevent the bank from advertising it. *Franklin National Bank v. New York*, 347 U.S. 373, 377-78, 74 S.Ct. 550, 553, 98 L.Ed. 767 (1954). Therefore, if Congress had intended to impose such a prohibition here, it presumably would have done so expressly.

Plaintiffs also attempt to read a geographical restriction into section 92's provision that underwriters whose policies a national bank sells be authorized to do business in the state in which the bank's selling office is located. 12 U.S.C. § 92. Again plaintiffs stretch the text too far. We agree with defendants that this provision "does not even hint at any restriction on the location of customers, much less any requirement that . . . customers reside only in the small

community in which the [selling] office is located." USBO's Reply Mem. at 8. Rather, it seems merely to reflect Congress' recognition that insurance is essentially a state-regulated industry. *See* Dfs. Reply Mem. at 7-8.

At the risk of laboring the obvious, our first inquiry under *Chevron* does not end with the statutory language itself. It is helpful to examine "the language and design of the statute as a whole" for signs of congressional intent on the issue at hand. *K Mart Corp.*, 486 U.S. at 291, 108 S.Ct. at 1817 (citation omitted). We are not unmindful of the fact that, as originally enacted, section 92 also authorized small town national banks to engage in mortgage activities. 39 Stat. 753 (1916).[19] Significantly, Congress expressly restricted the scope of these activities. A small town national bank could procure "loans on real estate located within one hundred miles of the" bank's office. *Id.* This provision indicates that Congress knew how to impose geographic restrictions when it wanted to. It deliberately chose not to with respect to insurance activities.[20]

[19] *See supra* note 8.

[20] Under the maxim *expressio unius est exclusio alterius*, if " 'Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir.1972)). While this maxim is subordinate " 'to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose,' " *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n. 23, 103 S.Ct. 683, 690, 74 L.Ed.2d 548 (1983) (quoting *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51, 64 S.Ct. 120, 123, 88 L.Ed. 88 (1943)), there is no conflict between the two in this case. As discussed immediately *infra*, the primary purpose of the legislation does not require the imposition of geographic restrictions on insurance sales and solicitation.

Turning next to the legislative history, we agree with the Comptroller that this history does not directly address the issue. The only substantive comments regarding section 92's insurance provision are contained in a letter to the Senate Banking and Currency Committee from Comptroller Williams, who drafted the provision and recommended its adoption by Congress. *See* 53 Cong.Rec. 11001 (1916). Williams was concerned with the competitive problems faced by many small national banks and their negative consequences for customers. While small national banks endowed with "average deposits" and "good management" could lend money at legal interest rates and still return a profit, "many banks," due to "small deposits," were unable to accomplish this task. *Id.* As a result, these banks often charged "excessive and in some cases grossly usurious" interest rates. *Id.* Williams believed the banks needed "additional sources of revenue" in order to compete more effectively "with local State banks and trust companies which are sometimes authorized . . . to do a class of business not strictly that of commercial banking." *Id.* Accordingly, he recommended that national banks "located in villages and towns" with populations not in excess of 3,000[21] "be permitted to act as agents for insur-

[21] Congress changed the operative number to 5,000. *See* 53 Cong.Rec. 11153.

ance companies . . . and for the negotiation of loans on . . . real estate . . . ." [22] *Id.*

Plaintiffs, recognizing Williams' concern with small, struggling banks, question its applicability to USBO, the forty-fourth largest bank in the country. Clearly, however, the statute makes no distinction between profitable and unprofitable banks. *Cf. United States v. Naftalin*, 441 U.S. 768, 773, 99 S.Ct. 2077, 2081, 60 L.Ed.2d 624 (1979) ("The short answer is that Congress did not write the statute that way."). Moreover, there is no indication that Williams *intended* to create such a distinction. Although he recognized that some small town banks were profitable, *see* 53 Cong.Rec. 11001, he recommended a provision that on its face applies to *all* small town banks, regardless of size or capitalization level. *See* 12 U.S.C. § 92. Finally, since 1963 the Comptroller has extended insurance privileges to branch offices, such as Bank Agency, that meet the statute's locational requirement. 12 C.F.R. § 7.7100. As we stated earlier, this interpretive ruling is no longer subject to challenge.[23] In light of these factors, we find plaintiffs' contention completely without merit.

Williams also expressed his views on why his proposal should be limited "to banks in small communities." 53 Cong. Rec. 11001. While "the new business" would help small town banks to become profitable, he doubted it would "assume such proportions as to dis-

[22] Williams believed that the real estate should be located in the bank's region of the country, where the bank might "have some direct knowledge as to [its] value. . . ." 53 Cong. Rec. 11001. He recommended no similar limitation on insurance activities.

[23] *See supra* note 11.

tract [bank] officers . . . from the principal business of banking." *Id.* For city banks, however, he thought the banking business already "afford[ed] ample scope for the energies of trained and expert bankers." *Id.* Williams also predicted that "in many small places" the market for insurance or mortgages would not "take up the entire time of an insurance broker," and that small town banks therefore would be unlikely "to trespass upon outside business naturally belonging to others." *Id.* Apparently, Williams assumed that a low demand for insurance in many small towns would deter insurance agents from soliciting there.

Plaintiffs argue that Williams' second rationale mandates a narrow construction of section 92. It evinces, they claim, a legislative intent to prohibit banks from marketing insurance outside the small towns in which they are located. Again we disagree. Williams' statement bears the indicia of a prediction, not a prerequisite. *See id.* ("the bank is not . . . *likely* to trespass") (emphasis added). As such, it is an insufficient basis for reading a geographic restriction into an otherwise silent statute. Moreover, we are not convinced that Williams would have written the statute any differently had he foreseen the societal changes that have rendered his prediction anachronistic.[24] As stated earlier, his primary goal was to provide small town banks with additional sources of revenue, not to protect the markets of competing insurance agents. *See id.* In the absence of a clearer indication of legislative intent, we are not free "to redraft" the statute "in an effort to achieve that which" plaintiffs believe

[24] We take judicial notice of the fact that this country is more densely populated and technologically advanced now than it was in 1916.

Congress "ha[s] failed to do." *United States v. Locke*, 471 U.S. 84, 95, 105 S.Ct. 1785, 1792-93, 85 L.Ed.2d 64 (1985).

C. Chevron Step Two

Because we hold that section 92 is silent with respect to geographic limitations on sales and solicitation, we must defer to any reasonable interpretation by the Comptroller on that issue. *See Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781; *Clinchfield Coal Co. v. Federal Mine Safety & Health Commission*, 895 F.2d 773 at 779-80 (D.C.Cir. 1990); *Securities Industry Association v. Board of Governors*, 821 F.2d at 813; *Investment Co. Institute v. FDIC*, 815 F.2d 1540, 1546 (D.C.Cir.), *cert. denied*, 484 U.S. 847, 108 S.Ct. 143, 98 L.Ed.2d 99 (1987). As our analysis under the first prong of *Chevron* indicates, "the literal language" of section 92 supports the Comptroller "and nothing in the legislative history" or the statute's purpose "casts doubt on [his] interpretation." *Northeast Bancorp*, 849 F.2d at 1503. According to plaintiffs, however, there are at least three reasons why the Approval Letter deserves no deference. First, they claim, it contravenes the general policy reflected in the country's banking laws of separating banking from commerce. Second, they argue that section 92 and the BHCA's "small town" insurance activities provision should be construed together, and that the latter clearly restricts the geographic scope of solicitation and sales. Third, plaintiffs contend that the Comptroller's decision is inconsistent with prior agency rulings on the same issue.

1. *The Policy of Separating Banking From Commerce*

Plaintiffs maintain that the banking laws of this country reflect a clear congressional policy to separate banking from commerce. In the present case, however, neither the face of the statute nor the legislative history contradicts the Comptroller. Therefore, even assuming *arguendo* that plaintiffs' statement of general policy is correct,[25] their argument must fail. *See Investment Co. Institute v. FDIC*, 815 F.2d at 1549 (citing *Chevron*, 467 U.S. at 843-44, 104 S.Ct. at 2781-82). "It is not our place to implement congressional policy in ways Congress itself fails to pursue." *Id.* (citing *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74, 106 S.Ct. 681, 688-89, 88 L.Ed.2d 691 (1986); *TVA v. Hill*, 437 U.S. 153, 194-95, 98 S.Ct. 2279, 2301-02, 57 L.Ed.2d 117 (1978)); *see also Chevron*, 467 U.S. at 866, 104 S.Ct. at 2793.

2. *The Effect of Section 4(c)(8)(C) of the Bank Holding Company Act*

Plaintiffs next argue that section 4(c)(8)(C) of the Bank Holding Company Act and section 92 of the National Bank Act are *in pari materia*—that is, pertain to the same subject—and thus should be construed together. They maintain that section 4(c)(8)

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[25] It is worth noting that § 92 is not the only "exception" to this "policy." For example, Congress has authorized national banks to deal in securities of certain governmental entities and to offer investments in the form of commingled investment retirement accounts. Glass-Steagall Act, § 16, 12 U.S.C. § 24 (Seventh); *see Investment Co. Inst. v. Conover*, 790 F.2d 925.

(C), the similar "small town" exception applicable to bank holding companies, "unequivocally limits the geographic scope" of insurance activities to the small community in which the bank is located. Pls. Reply Mem. at 6. Plaintiffs assert that "[t]his parallel provision," which was passed in 1982, "sweeps away any ambiguity in the legislative history of section 92 itself." *Id.* at 5. In short, they ask us to find that section 92 is governed by the same geographic limitations they claim are mandated by section 4(c)(8)(C) of the BHCA. For the reasons that follow, we reject their interpretation.

Clearly, the language of the two provisions is not identical. Whereas section 4(c)(8)(C) authorizes "any insurance agency activity in a place" whose population does not exceed 5,000, 12 U.S.C. § 1843(c)(8)(C), section 92 empowers a national bank "located and doing business in" such a place to act as a general insurance agent. *Id.* § 92. As a general rule, "[l]anguage in one statute usually sheds little light upon the meaning of different language in another statute," and "[t]he use of the specific in the [former] cannot fairly be read as imposing a limitation upon the general provision in the [latter]." *Russello v. United States*, 464 U.S. 16, 25, 104 S.Ct. 296, 301, 78 L.Ed.2d 17 (1983). Therefore, even if section 4(c)(8)(C) plainly restricted solicitation and sales to a place whose population does not exceed 5,000,[26] there ordinarily would be no justification for

[26] We question whether the geographic scope of the BHCA's "small town" exception is "unequivocally limit[ed]." Pls. Reply Mem. at 6. Although § 4(c)(8)(C) was "intended to conform to" existing Board regulations, Senate Report, *supra* note 8, at 38, U.S.Code Cong. & Admin. News 1982, p. 3092, one of which limited "solicitation or sales . . . to the small town and to other areas of less than 5,000 adjacent to" it, 51 Fed.Reg. at 36,206; *see First United Bancshares*, 73 Fed. Res.Bull. 162, the Board has subsequently departed from at least one of these regulations. *See Independent Ins. Agents*, 835 F.2d 1452 (agreeing with Board that statute did not compel principal place of business requirement); 12 C.F.R. § 225.25(b)(8)(iii); *see also supra* notes 10 & 12 and text accompanying note 12.

reading that restriction into the less specific terms of section 92.

The canon of *in pari materia* is a rather narrow exception to the general rule that different statutes should be read differently. In this case, the canon simply does not apply. The two provisions were enacted over sixty-five years apart and deal with two different types of banking institutions, each subject to a distinct set of laws and regulations administered by separate agencies. *See Erlenbaugh v. United States*, 409 U.S. 239, 244, 93 S.Ct. 477, 480, 34 L.Ed.2d 446 (1972) (rule's application makes the most sense when the statutes are on the same subject and were enacted by the same Congress at the same time). In addition, the statutes were not "intended to serve the same function." *Id.* 409 U.S. at 245, 93 S.Ct. at 481. The BHCA provision is concerned with activities that are "so closely related to banking . . . as to be a proper incident thereto," 12 U.S.C. § 1843(c)(8), whereas section 92 was designed to help small town banks increase their earnings by providing them with another source of revenue. *See* 53 Cong. Rec. 11001.

Section 4(c)(8) prohibits a bank holding company from engaging in, or owning "shares of any company" engaged in, nonbanking activities unless the Board determines that such activities are "so closely

related to banking . . . as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8); *see Independent Insurance Agents*, 835 F.2d at 1454. With a few exceptions, the statute precludes the Board from finding that the sale of "insurance as a principal agent, or broker" is "closely related to banking." *See* 12 U.S.C. § 1843(c)(8). One exception is "any insurance agency activity in a place" whose population does not exceed 5,000. *Id.* § 1843(c)(8)(C); *see Independent Insurance Agents*, 835 F.2d at 1455 nn. 4-5.

Section 92 addresses a completely unrelated concern: the need to provide small town national banks with additional sources of revenue. The authority it confers is in no way tied to whether the insurance activity is "closely related to banking." *See* 12 U.S.C. § 92. In fact, section 92 is a specific exception to the general rule that national banks are limited to "such incidental powers as shall be necessary to carry on the business of banking." *Id.* § 24 (Seventh).

Although the BHCA provision was "intended to conform to," *inter alia*, "the authority in" section 92, Senate Report, *supra* note 8, at 38, U.S.Code Cong. & Admin.News 1982, p. 3092, this alone is an insufficient reason to hold that the two sections are *in pari materia*. In light of the countervailing considerations discussed above, we are confident that the sections need not be construed together.

Plaintiffs next posit that, in passing the BHCA provision, Congress assumed that section 92 imposed geographic restrictions on sales and solicitation. Congress' understanding is clear, plaintiffs theorize, from the fact that section 4(c)(8)(C) "unequivocally limits the geographic scope" of insurance activities, Pls. Reply Mem. at 6, and was "intended to conform to . . . the authority in" section 92, Senate Report, *supra*

note 8, at 38, U.S.Code Cong. & Admin.News 1982, p. 3092. This postulate, even if true, would not alter the reasonableness of the Comptroller's interpretation.

Our review in this case centers on congressional intent in 1916, when section 92 was enacted. Since nothing in the BHCA itself sheds light on that intent, plaintiffs cannot rely on the maxim, announced in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371 (1969), that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 116-18 & n. 13, 100 S.Ct. 2051, 2060-61 & n. 13, 64 L.Ed.2d 766 (1980). The maxim does not apply to "[a] mere statement in a conference report . . . as to what the Committee believes an earlier statute meant. . . ." *Id.* 447 U.S. at 118 n. 13, 100 S.Ct. at 2061 n. 13; *see United States v. Southwestern Cable Co.*, 392 U.S. 157, 170, 88 S.Ct. 1994, 2001, 20 L.Ed.2d 1001 (1968) (one Congress' views as to construction of statute adopted many years earlier by another Congress have minimal or no significance) (citations omitted). Indeed, "subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history *prior* to its enactment." *GTE Sylvania*, 447 U.S. at 118 n. 13, 100 S.Ct. at 2061 n. 13 (emphasis added); *cf., e.g., United States v Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 331, 4 L.Ed.2d 334 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") (citation omitted). In this case, where "the literal language" of section 92 supports the Comptroller "and nothing in the legislative history"

or the statute's purpose "casts doubt on [his] interpretation," *Northeast Bancorp*, 849 F.2d at 1503, we see no reason to depart from this principle.

At this juncture, it is worth underscoring that Congress has charged separate agencies with administering the BHCA and the NBA. As USBO points out, nothing in the BHCA or its legislative history suggests that the Comptroller of the Currency must cede his interpretive authority over section 92 in favor of accepting any interpretation of section 4(c)(8)(C) that the Federal Reserve Board may choose to adopt. USBO's Reply Mem. at 30-31. If Congress wishes to avoid inconsistent interpretations of the two provisions, Congress alone has the power to act. In the meantime, the agencies are free to implement any reasonable policy where Congress has left a gap. *See Chevron*, 467 U.S. at 866, 104 S.Ct. at 2793. The Comptroller has done just that. The fact that his conclusion may be at odds with the Board's is not our concern.

3. *Prior Comptroller Interpretations*

Where an agency's interpretation of a statutory provision " 'is inconsistent with its prior analysis in similar situations without any acknowledgement of the fact, or cogent explanation as to why,' the 'result reached by the agency is impermissible under the second prong of *Chevron*.' " *General Motors Corp. v. National Highway Traffic Safety Administration*, 898 F.2d 165 at 174 (D.C.Cir.1990) (quoting *King Broadcasting Co. v. FCC*, 860 F.2d 465, 470 (D.C. Cir.1988)). Plaintiffs assert that the Approval Letter is inconsistent with earlier positions taken by the Comptroller regarding geographic restrictions under

section 92. We conclude, however, that prior to the Approval Letter, the Comptroller had never undertaken a comprehensive analysis of or implemented a restrictive policy on this issue. *Compare National Black Media Coalition v. FCC*, 775 F.2d 342, 355 (D.C.Cir.1985) ("After announcing a prospective rule and applying it faithfully for six years, the Commission, in effect, ignored it here."). Moreover, even if the Approval Letter represented a departure from prior policy, the Comptroller certainly provided a "cogent explanation as to why." *King Broadcasting*, 860 F.2d at 470. Therefore, plaintiffs' argument must fail.

Plaintiffs rely on statements in a few opinion letters, but these do not support their assertion. First, each statement constituted informal advice or opinion, not a definitive announcement of policy. *Compare National Black Media Coalition*, 775 F.2d at 355 ("After announcing a prospective rule and applying it faithfully for six years, the Commission, in effect, ignored it here."). Second, none of the statements establishes the position plaintiffs urge—that section 92 restricts insurance sales and solicitation to residents of the community in which the bank's selling office is located.[27]

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[27] The Comptroller's views on the geographic area a bank insurance agency may serve were first requested in mid-1970. *See* Letter from Robert Bloom, Chief Counsel, at 1 (July 17, 1970), Ex. 1 to Pls.Mem. [hereinafter Bloom Letter]. At that time, "[t]he only generalization" the Comptroller could "safely" make was that § 92 did not authorize a "significantly greater" "service area for the insurance activity . . . than that of the banking activity of the owner bank." *Id.* at 2. While plaintiffs rely heavily on this statement, they ignore that the very next year the Comptroller did not object to a

Based on the foregoing analysis, we hold that the Comptroller's interpretation, being "rational and consistent with the statute," must be upheld. *NLRB v. United Food & Commercial Workers*, 484 U.S. at 123, 108 S.Ct. at 420-21; *see Chevron*, 467 U.S. at 843-44, 104 S.Ct. at 2781-82. We turn now to plaintiffs' claim under the BHCA.

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bank's using an official at its main office to solicit business for its branch insurance agency. *See* Letter from Thomas G. DeSnazo, Deputy Comptroller (June 9, 1971). They also overlook a 1978 "no objection" letter issued to a bank that proposed to sell insurance from its small town agency to customers of other branches located in larger towns. Baris Letter, *supra* note 11. As these and other letters demonstrate, the Comptroller has never limited insurance sales to the community in which the selling office is located.

Plaintiffs maintain, however, that the Bloom Letter announced at least *some* geographic restriction, and that the Approval Letter unjustifiably disregarded this policy. We reject this assertion for three independent reasons. First, we doubt that the Bloom Letter ever constituted a definitive policy statement. *See* O'Keefe Letter, *supra* note 11, at 2; Chong Letter, *supra* note 7, at 1. Second, even if it did, the Approval Letter did not necessarily depart from it. The Bloom Letter simply opined that § 92 did not authorize a "significantly greater" "service area for the insurance activity . . . than that of the banking activity of the owner bank." Bloom Letter at 2. As we stated earlier, a national bank is free to offer its services to customers residing outside the community in which it is located. *See Franklin Nat'l Bank*, 347 U.S. at 377-78, 74 S.Ct. at 553. Therefore, with today's advanced mail and wire services and expansive advertising capabilities, the service area for a bank's customary business is potentially worldwide. Plaintiffs have not alleged that USBO's banking activity is limited to Banks, Oregon, or that it does not extend to the states in which Bank Agency currently offers insurance. Third, the Comptroller certainly has offered a "cogent explanation as to why" he believes that no geographic restrictions apply. *King Broadcasting*, 860 F.2d at 470. The Approval Letter was over twice as long as the Bloom Letter, and engaged in a much more in-depth analysis of the language and purpose of § 92. Therefore, the Comptroller's decision, even if inconsistent with past policy, was completely justified. *See General Motors*, 898 F.2d at 174 (citing *King Broadcasting*, 860 F.2d at 470).

IV. *Plaintiffs' Claim Under the Bank Holding Company Act*

An independent issue from the reasonableness of the Comptroller's construction of section 92 is whether the BHCA bars U.S. Bancorp, USBO's parent, from "launching nationwide insurance activities" through Bank Agency, USBO's subsidiary. Pls. Reply Mem. at 18. While plaintiffs concede that we lack jurisdiction to decide the merits of this question,[28] they contend that the Comptroller erred by issuing the Approval Letter without providing the Board "an opportunity to consider the legality of the proposed transaction." *Id.* at 19. Citing Supreme Court dictum that "exceptional circumstances . . . may stay the hand of the Comptroller," *Whitney National Bank*, 379 U.S. at 426 n. 7, 85 S.Ct. at 560 n. 7, plaintiffs argue that an injunction would be appropriate in this case. They rely on *Independent Bankers Association of America v. Conover*, 603 F.Supp. 948, 958 (D.D.C. 1985), in which the district court held that it was authorized to determine whether the Comptroller's action raised "substantial" questions under the BHCA and whether an injunction should issue to allow the Board to resolve those questions.

Courts have been reluctant to find the existence of "exceptional circumstances" that would warrant such an injunction. *See, e.g., American Insurance Association v. Clarke*, 865 F.2d 278, 288 (D.C.Cir.1988).

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[28] Pls.Reply Mem. at 18-19; *see supra* note 17.

This reluctance is especially justified where an injunction would halt the operations of an ongoing business such as Bank Agency. *Cf. Marshall & Ilsley Corp. v. Heimann*, 652 F.2d 685, 701 n. 27 (7th Cir.1981) (where ultimate relief requested was not a mere stay of Comptroller's proposed action, as in *Whitney*, but divestiture of assets acquired almost four years earlier, stay pending Board review would be inappropriate), *cert. denied*, 455 U.S. 981, 102 S.Ct. 1489, 71 L.Ed.2d 691 (1982). Moreover, we take "notice of the obvious fact that the Board has not taken advantage of its ample opportunity to act on" USBO's proposal.[29] *Independent Bankers v. Conover*, 603 F.Supp. at 958 n. 17. "Although the *Whitney* test is not time-bound, it appears that the original concern was that the Board had 'not had an *opportunity* to determine' the issue presented." *Id.* (quoting *Whitney*, 379 U.S. at 425, 85 S.Ct. at 560) (emphasis in *Independent Bankers v. Conover*). In *Independent Bankers v. Conover*, the Board had taken no action for over one and a half years. *Id.* In the present case, almost four years have elapsed since the Comptroller issued the Approval Letter. During that time, the Board has taken no steps toward resolving the allegedly "substantial" BHCA issue arising therefrom. We are satisfied that under these circumstances there is no compelling need for an injunction.

V. *Conclusion*

Based on the foregoing analysis, we hold:

(1) that section 92 of the NBA is silent on the issue of geographic restrictions on the solicitation and sale of insurance;

[29] The Board clearly has the power to act. *See* 12 U.S.C. § 1844(b), (c), (e).

(2) that the Comptroller reasonably and permissibly interpreted section 92 as authorizing Bank Agency, a subsidiary of USBO, to offer insurance to customers residing outside Banks, Oregon, regardless of the geographic location of said customers;

(3) that there are no "exceptional circumstances" in this case warranting a stay of the Comptroller's decision pending Federal Reserve Board review of the legality of USBO's proposal under the BHCA; and

(4) plaintiffs' claims for relief should be addressed to Congress; this Court is the wrong forum.

An Order consistent with this Opinion has been entered this day.

ORDER

Upon consideration of the motions of defendants and defendant-intervenor for dismissal or summary judgment and plaintiffs' cross-motion for summary judgment, the oppositions thereto, the briefs of amici curiae, and the entire record herein, and for the reasons stated in an accompanying Opinion entered this day, it is by the Court this 8th day of May, 1990,

ORDERED that summary judgment is entered in favor of defendants and defendant-intervenor on all counts; it is

ORDERED that plaintiffs' cross-motion for summary judgment is denied; and it is

FURTHER ORDERED that this case is dismissed with prejudice.

APPENDIX D

COMPTROLLER OF THE CURRENCY
Administrator of National Banks

Washington, D.C. 20219

August 18, 1986

Mr. T. Dalrymple
Assistant Vice President &
Assistant Secretary
United States National Bank of Oregon
P.O. Box 4412
Portland, Oregon 97208

Dear Mr. Dalrymple:

This is in response to your request to establish *de novo* an operating subsidiary, pursuant to 12 C.F.R. § 5.34, to act as agent in the sale of general insurance under 12 U.S.C. § 92. The subsidiary will be wholly-owned by the United States National Bank of Oregon ("Bank"), Portland, Oregon. It intends to sell a full range of insurance products to customers of the Bank and others from an office at the Bank's branch location in Banks, Oregon, a town with a population of under 5,000. The Bank has represented that the insurance activities will be conducted in reliance on 12 U.S.C. § 92 and an opinion letter of December 1, 1983, from Debra A. Chong, Senior Attorney, Western District.

On October 24, 1984, the Office extended the period for review of the Bank's operating subsidiary notification in order to reassess the position taken by Ms. Chong regarding the permissible market area for the

sale of insurance under 12 U.S.C. § 92. Based on our analysis of the relevant legal precedent, we have concluded that Ms. Chong correctly determined that a national bank or its branch which is located in a place of 5,000 or under population may sell insurance to existing and potential customers located anywhere. In other words, while the bank or bank branch must be located in a small town, it can sell insurance to persons and businesses located outside that town.

Accordingly, the Bank may establish the proposed operating subsidiary at its branch location in Banks, Oregon, in order to market insurance to existing and potential customers regardless of where the insurance customers are located. However, this opinion does not authorize the sale of broad forms of insurance from bank or branch locations in towns of over 5,000 population. A full discussion follows.

It is clear from the plain language of 12 U.S.C. § 92 that a national bank located and doing business in a place with a population of 5,000 or under may act as agent for an insurance company offering a full range of insurance products. The bank is not limited to selling insurance which is incidental to banking under 12 U.S.C. § 24(7).

The Office has determined further that a bank with a branch located in a place whose population does not exceed 5,000 can act as agent from the branch office even though the bank is in a place of over 5,000 population.[1] In addition, the Office has authorized national banks to establish operating subsidiaries to act as agent in the sale of insurance under section 92

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[1] *See* 12 C.F.R. § 7.7100.

from a bank's main office or branch location, whichever is located in a town of 5,000 or less.

In analyzing whether the market area for the sale of insurance is restricted geographically, the language of the statute first must be examined. Section 92 provides in pertinent part:

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which such bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company . . . .

12 U.S.C. § 92.

Clearly the statute permits a national bank to act as agent for an insurance company authorized to do business in the state (in your case, Oregon). The statute is silent as to whether the bank can sell insurance as agent for that company to persons and businesses located in different states. It is reasonable to conclude that the bank can sell to such customers provided the insurance company whose policies it is selling is authorized to do business in those states.

It is pertinent to note in this regard that section 92, as originally enacted in 1916, included authority for national banks to act as brokers or agents for others

in making or procuring loans on real estate.[2] This authority was limited to real estate located within one hundred miles of where the bank was located. The imposition of such a geographic limitation in the statute with regard to the bank's brokerage of real estate loans and the absence of such a limitation on its insurance activities indicates, under the rules of statutory construction, congressional intent not to limit geographically a bank's market area for its insurance products.[3]

The legislative history of section 92 does not directly address geographic limitations on the insurance agency marketing activities of national banks. Indeed, we are not aware of any substantive comments on section 92 by members of Congress.

The only guidance available regarding legislative intent, therefore is a 1916 letter to the Senate Banking and Currency Committee from the then Comptroller of the Currency, John Skelton Williams, recommending enactment of section 92.[4] Although not discussing

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[2] Prior to being amended by the Garn-St Germain Depository Institutions Act of 1982, P.L. 97-320, 12 U.S.C. § 92 read as follows, in relevant part—

> . . . and may also act as broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank is located, receiving for such services a reasonable fee or commission . . . .

[3] *See* C. Sands, 2A Sutherland Statutory Construction § 47.23 (4th ed. 1984) (discussing the maxim of "expressio unius est exclusio alterius"); *see also id.* § 51.02 (omission of provision in similar statute significant to show different intent).

[4] Since the Comptroller was, in essence, the sponsor of the legislation and his recommendations were adopted largely

the geographic scope of his proposal, the letter does present the Comptroller's reasons for suggesting that Congress adopt the insurance provisions of section 92.

From the letter and from court opinions which discuss the purpose of the statute, it appears that the primary reason for enacting section 92 was to provide additional income to banks in small towns that were having problems deriving a reasonable profit from their banking business.[5] An additional concern raised by the Comptroller was the need to make insurance coverage available to the local population.

Therefore, based on what appears to be the main purpose behind enactment of the insurance provision in section 92, it is consistent with that purpose to allow a national bank to sell insurance to customers residing outside the particular small town where its selling main office or branch is located. It may be the case that the market area for the general banking services of some small town banks may not be large enough to improve significantly the bank's profitability if its insurance sales are limited to that area.

It should be noted also that although the Comptroller has authority to regulate under section 92, he has never imposed geographic limits on the insurance activities of national banks in small towns through reg-

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unaltered, his views are considered valuable as an interpretive aid. *See* C. Sands, 2A Sutherland Statutory Construction § 48.11 (4th ed. 1984).

[5] *See* 53 Cong. Rec. 11001 (1916) (letter from Comptroller Williams recommending enlarging the powers of small national banks to "provide them with additional sources of revenue"); *see also, e.g., Saxon v. Georgia Association of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968).

ulation or interpretive ruling. Furthermore, we are not aware of any Oregon law that would impose geographic restrictions *per se* on a national bank's insurance agency activities either within or outside the state.[6]

In summary, 12 U.S.C. § 92 permits the Bank at its operating subsidiary in Banks, Oregon, to sell insurance as agent to existing and potential customers regardless of where the insurance customers are located. The only limitation in this regard is that the Bank could not sell insurance for a company to customers located in a state where the insurance company is not authorized to do business.

Sincerely,

/s/ Judith A. Walter
Senior Deputy Comptroller
for National Operations

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[6] *See, e.g., Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) (Federal law applies if state has not enacted any law to regulate business of insurance which would be invalidated, impaired, or superseded by application of Federal law); *Aetna Life Ins. Co. v. Washington Life & Disability Insurance Guaranty Ass'n*, 520 F.2d 162 (Wash. 1974) (state regulation lacks extraterritorial effect).

APPENDIX E

Section 13 of the Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251, 263-264, provided:

POWERS OF FEDERAL RESERVE BANKS.

Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks and drafts upon solvent member banks, payable upon presentation; or, solely for exchange purposes, may receive from other Federal reserve banks deposits of current funds in lawful money, national-bank notes, or checks and drafts upon solvent member or other Federal reserve banks, payable upon presentation.

Upon the indorsement of any of its member banks, with a waiver of demand, notice and protest by such bank, any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Federal Reserve Board to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this Act. Nothing in this Act contained shall be construed to prohibit such notes, drafts, and bills of exchange, secured by staple agricultural products, or other goods, wares, or merchandise from being eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trad-

ing in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a maturity at the time of discount of not more than ninety days: *Provided*, That notes, drafts, and bills drawn or issued for agricultural purposes or based on live stock and having a maturity not exceeding six months may be discounted in an amount to be limited to a percentage of the capital of the Federal reserve bank, to be ascertained and fixed by the Federal Reserve Board.

Any Federal reserve bank may discount acceptances which are based on the importation or exportation of goods and which have a maturity at time of discount of not more than three months, and indorsed by at least one member bank. The amount of acceptances so discounted shall at no time exceed one-half the paid-up capital stock and surplus of the bank for which the rediscounts are made.

The aggregate of such notes and bills bearing the signature or indorsement of any one person, company, firm, or coporation rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

Any member bank may accept drafts or bills of exchange drawn upon it and growing out of transactions involving the importation or exportation of goods having not more than six months sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half its paid-up capital stock and surplus.

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

The rediscount by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

The Federal Reserve Act Amendments of 1916, ch. 461, 39 Stat. 752, provided:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "Federal reserve Act," approved December twenty-third, nineteen hundred and thirteen, be, and is hereby, amended as follows:

At the end of section eleven insert a new clause as follows:

"(m) Upon the affirmative vote of not less than five of its members the Federal Reserve Board shall have power, from time to time, by general ruling, covering all districts alike, to permit member banks to carry in the Federal reserve banks of their respective districts any portion of their reserves now required by section nineteen of this Act to be held in their own vaults."

That section thirteen be, and is hereby, amended to read as follows:

"Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks, and drafts, payable upon presentation, and also, for collection, maturing bills; or solely for purposes of exchange or of collection, may receive from other Federal reserve banks deposits of current funds in lawful money, national-bank notes, or checks upon other Federal reserve banks, and checks and drafts, pay-

able upon presentation within its district, and maturing bills payable within its district.

"Upon the indorsement of any of its member banks, which shall be deemed a waiver of demand, notice and protest by such bank as to its own indorsement exclusively, any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Federal Reserve Board to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this Act. Nothing in this Act contained shall be construed to prohibit such notes, drafts, and bills of exchange, secured by staple agricultural products, or other goods, wares, or merchandise from being eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a maturity at the time of discount of not more than ninety days, exclusive of days of grace: *Provided*, That notes, drafts, and bills drawn or issued for agricultural purposes or based on live stock and having a maturity not exceeding six months, exclusive of days of grace, may be discounted in an amount to be limited to a percentage of the assets of the Federal reserve bank, to be ascertained and fixed by the Federal Reserve Board.

"The aggregate of such notes, drafts, and bills bearing the signature or indorsement of any one borrower, whether a person, company, firm, or corporation, rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

"Any Federal reserve bank may discount acceptances of the kinds hereinafter described, which have a maturity at the time of discount of not more than three months' sight, exclusive of days of grace, and which are indorsed by at least one member bank.

"Any member bank may accept drafts or bills of exchange drawn upon it having not more than six months' sight to run, exclusive of days of grace, which grow out of transactions involving the importation or exportation of goods; or which grow out of transactions involving the domestic shipment of goods provided shipping documents conveying or securing title are attached at the time of acceptance; or which are secured at the time of acceptance by a warehouse receipt or other such document conveying or securing title covering readily marketable staples. No member bank shall accept, whether in a foreign or domestic transaction, for any one person, company, firm, or corporation to an amount equal at any time in the aggregate to more than ten per cent of its paid-up and unimpaired capital stock and surplus unless the bank is secured either by attached documents or by some other actual security growing out of the same transaction as the acceptance and no bank shall accept such bills to an amount equal at any time in the aggregate

to more than one-half of its paid-up and unimpaired capital stock and surplus.

"Any Federal reserve bank may make advances to its member banks on their promissory notes for a period not exceeding fifteen days at rates to be established by such Federal reserve banks, subject to the review and determination of the Federal Reserve Board, provided such promissory notes are secured by such notes, drafts, bills of exchange, or bankers' acceptances as are eligible for rediscount or for purchase by Federal reserve banks under the provisions of this Act, or by the deposit or pledge of bonds or notes of the United States."

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal reserve Act.

"The discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange,

and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

"That in addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent; and may also act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located, receiving for such services a reasonable fee or commission: *Povided* [sic], *however*, That no such bank shall in any case guarantee either the principal or interest of any such loans or assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

"Any member bank may accept drafts or bills of exchange drawn upon it having not more than three

months' sight to run, exclusive of days of grace, drawn under regulations to be prescribed by the Federal Reserve Board by banks or bankers in foreign countries or dependencies or insular possessions of the United States for the purpose of furnishing dollar exchange as required by the usages of trade in the respective countries, dependencies, or insular possessions. Such drafts or bills may be acquired by Federal reserve banks in such amounts and subject to such regulations, restrictions, and limitations as may be prescribed by the Federal Reserve Board: *Provided, however*, That no member bank shall accept such drafts or bills of exchange referred to this paragraph for any one bank to an amount exceeding in the aggregate ten per centum of the paid-up and unimpaired capital and surplus of the accepting bank unless the draft or bill of exchange is accompanied by documents conveying or securing title or by some other adequate security; *Provided further*, That no member bank shall accept such drafts or bills in an amount exceeding at any time the aggregate of one-half of its paid-up and unimpaired capital and surplus."

That subsection (e) of section fourteen, be, and is hereby, amended to read as follows:

"(e) To establish accounts with other Federal reserve banks for "exchange purposes and, with the consent of the Federal Reserve Board, to open and maintain accounts in foreign countries, appoint correspondents, and establish agencies in such countries wheresoever it may deem best for the purpose of purchasing, selling, and collecting bills of exchange, and to buy and sell, with or without its indorsement, through such correspondents or agencies bills of exchange arising out of actual commercial transactions which have not more than ninety days to run, exclusive of days of grace, and which bear the signature of two or more responsible parties, and, with the consent of the Federal Reserve Board, to open and maintain banking accounts for such foreign correspondents or agencies."

That the second paragraph of section sixteen be, and is hereby, amended to read as follows:

"Any Federal reserve bank may make application to the local Federal reserve agent for such amount of the Federal reserve notes hereinbefore provided for as it may require. Such application shall be accompanied with a tender to the local Federal reserve agent of collateral in amount equal to the sum of the Federal reserve notes thus applied for and issued pursuant to such application. The collateral security thus offered shall be notes, drafts, bills of exchange, or acceptances rediscounted under the provisions of section thirteen of this Act, or bills of exchange indorsed by a member bank of any Federal reserve district and purchased under the provisions of section fourteen of this Act, or bankers' acceptances purchased under the provisions of said section fourteen. The Federal reserve agent shall each day notify the Federal Reserve Board of all issues and withdrawals of Federal reserve notes to and by the Federal reserve bank to which he is accredited. The said Federal Reserve Board may at any time call upon a Federal reserve bank for additional security to protect the Federal reserve notes issued to it."

That section twenty-four be, and is hereby, amended to read as follows:

"SEC. 24. Any national banking association not situated in a central reserve city may make loans secured by improved and unencumbered farm land situated within its Federal reserve district or within a radius of one hundred miles of the place in which such bank is located, irrespective of district lines, and may also make loans secured by improved and unencumbered real estate located within one hundred miles of the place in which such bank is located, irrespective of district lines; but no loan made upon the security of such farm land shall be made for a longer time than five years, and no loan made upon the security of such real estate as distinguished from farm land shall be made for a longer time than one year nor shall the amount of any such loan, whether upon such farm land or upon such real estate, exceed fifty per centum of the actual value of the property offered as security. Any such bank may make such loans, whether secured by such farm land or such real estate, in an aggregate sum equal to twenty-five per centum of its capital and surplus or to one-third of its time deposits and such banks may continue hereafter as heretofore to receive time deposits and to pay interest on the same.

"The Federal Reserve Board shall have power from time to time to add to the list of cities in which national banks shall not be permitted to make loans secured upon real estate in the manner described in this section."

That section twenty-five be, and is hereby, amended to read as follows:

"SEC. 25. Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Federal Reserve Board

for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said board, either or both of the following powers:

"First. To establish branches in foreign countries or dependencies or insular possessions of the United States for the furtherance of the foreign commerce of the United States, and to act if required to do so as fiscal agents of the United States.

"Second. To invest an amount not exceeding in the aggregate ten per centum of its paid-in capital stock and surplus in the stock of one or more banks or corporations chartered or incorporated under the laws of the United States or of any State thereof, and principally engaged in international or foreign banking, or banking in a dependency or insular possession of the United States either directly or through the agency, ownership, or control of local institutions in foreign countries, or in such dependencies or insular possessions.

"Such application shall specify the name and capital of the banking association filing it, the powers applied for, and the place or places where the banking operations proposed are to be carried on. The Federal Reserve Board shall have power to approve or to reject such application in whole or in part if for any reason the granting of such application is deemed inexpedient, and shall also have power from time to time to increase or decrease the number of places where such banking operations may be carried on.

"Every national banking association operating foreign branches shall be required to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, and every mem-

ber bank investing in the capital stock of banks or corporations described under subparagraph two of the first paragraph of this section shall be required to furnish information concerning the conditions of such banks or corporations to the Federal Reserve Board upon demand, and the Federal Reserve Board may order special examinations of the said branches, banks, or corporations at such time or times as it may deem best.

"Before any national bank shall be permitted to purchase stock in any such corporation the said corporation shall enter into an agreement or undertaking with the Federal Reserve Board to rest at [sic] its operations or conduct its business in such manner or under such limitations and restrictions as the said board may prescribe for the place or places wherein such business is to be conducted. If at any time the Federal Reserve Board shall ascertain that the regulations prescribed by it are not being complied with, said board is hereby authorized and empowered to institute an investigation of the matter and to send for persons and papers, subpoena witnesses, and administer oaths in order to satisfy itself as to the actual nature of the transactions referred to. Should such investigation result in establishing the failure of the corporation in question, or of the national bank or banks which may be stockholders therein, to comply with the regulations laid down by the said Federal Reserve Board, such national banks may be required to dispose of stock holdings in the said corporation upon reasonable notice.

"Every such national banking association shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches estab-

lished by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item.

"Any director or other officer, agent, or employee of any member bank may, with the approval of the Federal Reserve Board, be a director or other officer, agent, or employee of any such bank or corporation above mentioned in the capital stock of which such member bank shall have invested as hereinbefore provided, without being subject to the provisions of section eight of the Act approved October fifteenth, nineteen hundred and fourteen, entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.' "

Section 20 of the War Finance Corporation Act of 1918, Ch. 45, 40 Stat. 506, provided:

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

"SEC. 5202. No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by loses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association or dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

"Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act."

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